United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

Court of Appeals, District of Columbia.

OCTOBER TERM, 1904.

No. 1266 AND No. 1460.

JOSEPH J. DARLINGTON AND GEORGE W. GRAY, EXECUTORS OF PHILIP A. TRACY, DECEASED, APPELLANTS,

vs.

ERLE H. TURNER, WILMER TURNER, ASHBY TURNER, AND LUNETTE TURNER, BY WILMER TURNER, NEXT FRIEND, APPELLEES.

BRIEF FOR APPELLANTS.

This is an appeal from a decree of the supreme court of the District of Columbia, in equity sitting, entered on the 10th day of October, 1902, by the terms of which it was decreed that appellants' testator, Philip A. Tracy, was a trustee for the appellees (complainants below) as to all of the property and estate of one Silas H. Turner being or coming into the hands of said Tracy at and after the death of said Silas H. Turner; it was further decreed that the appellees (complainants below) were entitled to an accounting from appellants (defendants below) as executors of said Philip A. Tracy

of and concerning the moneys and properties received by said Tracy from said Silas H. Turner, and, for the purpose of such accounting, that the cause be referred to the auditor. The decree further directed the manner of the accounting and provided for the allowance of certain credits to the defendants (Rec., p. 25).

There is also an appeal from a decree of the supreme court of the District of Columbia, in equity sitting, entered on the 8th day of June, 1904, ratifying and confirming the auditor's report, and, pursuant to the findings of said report, adjudging and decreeing certain sums to be due from appellants, as executors of Philip A. Tracy, to appellees, and overruling the exceptions of appellants to said report (Rec. No. 1460, p. 27).

By stipulation of counsel it is agreed that these appeals be heard as one appeal, on the transcript of record filed on the 16th day of December, 1902, and on the transcript of the record filed on the 24th day of August, 1904, which, it is agreed, may be considered to "together constitute the record on said last appeal" (Rec., p. 36).

Statement of Facts.

The undisputed facts in this case, briefly stated, are as follows:

In 1871 Silas H. Turner, a resident of Virginia, came to this city and placed in the hands of his friend, Philip A. Tracy, a resident of Washington and at that time a clerk in the Post Office Department, the sum of $12,000, and asked Tracy to aid him in the investment of that sum in real-estate notes. Tracy agreed to do this, and attended to the collection of the notes as they came due, Turner retaining the notes in his possession. After a while, Turner, in order to facilitate the management of his business, sent the notes to Tracy, who thereafter collected the proceeds and reinvested them, send-

ing Turner a statement from time to time, and occasionally sending money (Rec., p. 15).

On April 30, 1888, Silas Turner made a will (prepared by Tracy) bequeathing all his property to the four children of his brother, "Thomas M. Turner, of Minden, La., and appointing Philip A. Tracy to distribute the proceeds equally between them" (Rec., p. 265).

In August, 1888, Thomas M. Turner, hearing that his brother Silas was sick, came to Marshall, Va., where Silas was then staying with his niece, Mary Rust, and remained with him until he died, in September, 1888.

After his death, Thomas Turner took possession of his brother's effects, had the will probated at Warrenton, Va., and came to Washington, in company with Eppa Hunton, Esq., his lawyer, to see Tracy and to collect the notes, bringing with him a list of notes (Ex. E. H. T. No. 22, Rec., p. 21) which he had found among Silas Turner's possessions. This list he showed Tracy, and he says Tracy admitted that he had those notes in his possession, and that they were "as good as gold" (Rec., p. 108). No immediate transfer or settlement of the notes was made at that time, however, as Tracy was about to go on a vacation of two or three weeks to the country.

When Tracy returned to Washington he wrote Turner to come and attend to the settlement of the estate. Turner came, and the result of his conference was that Tracy handed to Turner a package of notes amounting to $25,979.39 and took Turner's receipt for that amount (Exhibits T. M. T. Nos. 1 and 2).

The circumstances attending this transaction will be gone into more fully hereafter.

At the time of Silas Turner's death, the children of Thomas M. Turner, beneficiaries under the will of Silas, were Erle, born in 1868; Wilmer, born in 1875; Ashby, born in 1880, and Lunette, born in 1882 (Rec., p. 105). It is thus seen that at the time of the death of Silas H. Turner, and at the

time of the transfer of the notes by Tracy to Turner in 1888, Erle was twenty years old, Wilmer thirteen, Ashby eight, and Lunette four.

Thomas Turner deposited the notes given him by Tracy in the Second National Bank of this city (see his account with the Bank, Ex. T. M. T. No. 23, Rec., pp. 243–245), and returned to his home at Minden, La., where he gave up his position as clerk of the court, sold his house, and moved to Vernon, Texas, with all his family. There he invested part of the money which Tracy gave him in a farm near Vernon and in a house and lot in the town of Vernon, and here he and his whole family lived and were wholly supported out of the proceeds of the notes until the time this bill was filed, except that Erle spent a part of that time in Philadelphia and Wilmer in Virginia, attending school and teaching.

Tracy had correspondence with Erle Turner and with Mrs. Turner continuously from 1894 until the time of his death, and in these letters referred to a small fund in his hands which had not been turned over to Thomas M. Turner. This fund, as we shall show later, was probably the "Maryland Avenue lots" mentioned in the list of notes Ex. E. H. T. No. 22.

Tracy died in July, 1898, having left a last will and testament in which he appointed the defendants, George W. Gray and Joseph J. Darlington, his executors.

The material parts of the will are as follows:

"I, Philip A. Tracy, of Washington, in the District of Columbia, knowing well the certainty of death and the uncertainty of the time thereof, do make and declare this and no other to be my last will and testament; that is to say:—

"Item first: I direct that my executors, hereinafter named, shall collect all debts justly owing to my estate and pay all debts that I may justly owe, including my funeral expenses.

"Item second: I direct that my executors shall sell for the highest price obtainable in cash, at public or private sale, as they may deem best, all my property both real and

personal, and wheresoever situated, except that named in item eleventh of this will.

"Item third: My executors shall purchase and cause to be erected in lot numbered one hundred and ninety-eight (198) in "Oak Hill" cemetery, in the District of Columbia, a family monument of Barre gray granite, of modern design, not less than twelve feet in height, whereon shall appear, in raised letters and figures, my family name, and the names of my father, mother, brother, sister and myself, and the date of the birth and death of each, as stated in the memorandum attached to this will. This monument to be erected and paid for as soon as practicable after my death, and before any of the following legacies are paid.

"Item fourth: I give and bequeath to the Oak Hill Cemetery Company in the District of Columbia, one thousand ($1,000.) dollars in cash to be invested by the company, and the revenue and income derived from such investment to be used for the purpose of keeping lot No. 198 in the said cemetery in good order and condition, and for cleaning and repairing the monument whenever necessary.

"Item fifth: My executors shall pay to the National Bank of the Republic, in this city, the balance, if any, due on the note of my sister Adelaide Tracy, deceased, after deducting the proceeds of the sale of the Metropolitan Railroad stock held by the bank as collateral.

"Item seventh: I give and bequeath to Norman P. Lake, of Rectortown, Virginia, one hundred ($100.) dollars in cash, and my gold watch and chain.

"Item eighth: I give and bequeath to Daniel H. Greene of Rectortown, Virginia, one hundred ($100.) dollars in cash.

"Item ninth: I give and bequeath to the Home for Incurables in the District of Columbia, one hundred ($100.) dollars in cash, for the use of the home.

"Item tenth: I give and bequeath to the trustees of Trinity Episcopal church, northeast corner of Third and C streets, N. W., in this city, two thousand (2,000) dollars in cash to help pay for the erection of a building for the use of the Sunday school.

"Item eleventh: I give and bequeath to the "Little Sisters of the Poor," on H street, N. E., in this city, all my wearing apparel, trunks and books.

"Item twelfth: The total sum of money remaining in the hands of my executors, I give and bequeath to the trustees

of the Epiphany Church Home in this city, to help pay for the enlargement of the building now used as the home, or for the erection of another building for the same use and purpose.

"I nominate, constitute and appoint George W. Gray and Joseph J. Darlington, of this city, the executors of this my last will and testament, having confidence in their honesty and believing that they will faithfully carry out my wishes and intentions.

"In witness whereof I have hereunto set my hand this twenty-second * * * day of March, in the year of our Lord, one thousand eight hundred and ninety-four.

"PHILIP A. TRACY."

(Rec., pp. 21–22.)

As soon as Erle Turner learned of Tracy's death he began preparations for a suit against his estate, which resulted in the present suit instituted by himself and his brother and sisters against Tracy's estate, alleging that the entire fund bequeathed to them by Silas Turner was in Tracy's hands at the time of Turner's death and remained in Tracy's hands up to the time of his, Tracy's, death, and had come into the hands of his executors, the defendants.

In apparent anticipation of the defense of laches, the complainants alleged, under oath, that they were in entire ignorance of all facts relating to the trust estate until September, 1898, when Erle Turner learned of the death of Tracy.

The bill prayed for discovery of certain "instructions" which Tracy left to his executors, and prayed also that Tracy be decreed to be a trustee for the complainants as to the whole fund which he received from Silas Turner, and for an accounting of this fund.

The answer averred that Tracy paid to Thomas Turner the whole amount of money belonging to the estate of Silas Turner in his hands, that such payment was a complete discharge to him, and that none of said moneys or funds had come into defendants' hands as executors. The answer also set up, as a defense, the laches of complainants, and disclosed

the "instructions" left by Tracy in which he gives an account of his transactions with Thomas Turner (Rec., p. 16)

After testimony on each side had been taken, the case was heard by Mr. Justice Hagner, who decreed:

1. That Tracy was trustee for the complainants in respect of all the property and estate of S. H. Turner being or coming into the hands of said Tracy at and after the death of said Silas Turner.

2. That complainants are entitled to an accounting from defendants as executors of Tracy of the moneys and properties received by Tracy from Silas Turner.

3. That the cause be referred to the auditor to state such account, and that on such accounting the defendants be entitled to credits for the sums which it appears from the evidence were paid at various times by the said Tracy in his lifetime to Erle H. Turner after said Erle H. Turner had attained his majority.

4. That for the purpose of stating the account directed to be stated and of ascertaining what credits the defendants may be entitled to, the auditor is to consider all the testimony in the case bearing on that subject and is authorized to take further testimony, as the parties to this cause may desire, as to the correctness of the allegation of the defendants that the money received by Thomas M. Turner from said Tracy was expended for the benefit of the complainants; that the expenditures were reasonable for the complainants under the circumstances, and that the said Thomas M. Turner was unable to support the complainants, his children, from his own means.

5. Upon the completion of said hearing before the auditor the said auditor shall report to this court the said statement of account and his proceedings under the reference for the final decree of the court.

Rec., p. 25.

Pursuant to this decree there were several hearings before the auditor, and on the 9th day of March, 1904, the auditor filed his report, in which he found that the Tracy estate was chargeable with a primary liability of $30,051.03, with interest, and that each of the complainants was entitled, after deducting certain credits allowed by the auditor, in the shape of payments by Tracy to Erle Turner, and in the shape of maintenance, support, and education derived by each of the other complainants from Silas Turner's estate in the hands of their father, to the following sums:

To Erle H. Turner, $12,006.11, with interest on $7,512.75 from February 1, 1904, until paid.

To Wilmer Turner, $13,226.11, with interest on $7,512.75 from February 1, 1904, until paid.

To Ashby Turner, $11,963.36, with interest on $7,512.75 from February 1, 1904, until paid.

To Lunette Turner, $11,445.86, with interest on $7,512.75 from February 1, 1904, until paid.

To this report the defendants filed fourteen exceptions, to be considered *in extenso* hereinafter, all of which were, by the decree of the court below, entered on the 8th day of June, 1904, overruled, and said auditor's report was, by said decree, ratified and confirmed, and said several amounts adjudged payable to the complainants from the defendants' testator.

This decree further found, basing its finding on a stipulation between counsel (Rec. No. 1460, p. 27), that the defendants have personal assets of their testator in the sum of $47,000, and real estate consisting of lots 1 and 7, in square 649, city of Washington, District of Columbia, applicable to the discharge of the claim of complainants.

From this decree also appellants have appealed.

Assignment of Errors.

A.

ASSIGNMENT OF ERRORS ON DECREE OF OCTOBER 10, 1902.

1. The court below erred in not dismissing the bill of complaint because of the variance between the pleadings and the proof.

2. The court below erred in decreeing that defendants' testator, Philip A. Tracy, was trustee for the complainants in respect of all the property and estate of Silas H. Turner being or coming into the hands of said Tracy at and after the death of the said Silas H. Turner.

3. The court below erred in not holding that, as a court of equity, it was without jurisdiction to grant the relief prayed for in the bill of complaint, there being to the complainants a full, adequate, and complete remedy at law.

4. The court below erred in holding that the complainants were entitled to an accounting from the defendants as executors of said Philp A. Tracy of and concerning the moneys and properties received by said Tracy from said Silas H. Turner.

5. The court below erred in referring said cause to the auditor of said court to state such account.

6. The court below erred in not holding that Philip A. Tracy was not at any time trustee for the complainants in respect of the property and estate of Silas H. Turner being or coming into the hands of said Tracy at and after the death of said Silas H. Turner.

7. The court below erred in not holding that the payment and delivery by Philip A. Tracy to Thomas Turner, father of the complainants, of the notes and moneys described in Exhibit T. M. T. No. 2 (Rec., p. 221) was a valid discharge

and acquittance to said Tracy, *pro tanto*, as to any claim or demand made on him thereafter by the complainants.

8. The court below erred in not holding that the complainants, Erle H. Turner and Wilmer Turner, were barred from the prosecution of their claim against the estate of Philip A. Tracy by their acquiescence in Tracy's payment and delivery of the notes and moneys in his possession to Thomas M. Turner, and by their laches.

B.

Assignment of Errors on the Decree of June 8th, 1904.

1. The court below erred in overruling the defendants' exceptions to the auditor's report.

2. The court below erred in ratifying and confirming the auditor's report.

3. The court below erred in decreeing that there are due from defendants' testator to the several complainants the various sums set out in said decree.

4. The court below erred in overruling defendants' exception to the finding of the auditor that the estate of Philip A. Tracy was primarily liable to the complainants in the sum of $30,051.03.

5. The court below erred in overruling defendants' exception to the finding of the auditor that the liability of the estate of Philip A. Tracy to the complainants is to be determined by the list of notes Exhibit E. H. T. No. 22 (Rec., p. 211) and not by the receipt given by Thomas Turner to Philip A. Tracy, being Exhibit T. M. T. No. 2 (Rec., p. 271), if said estate be liable in any sum.

6. The court below erred in overruling defendants' exception to the refusal of the auditor to find that the estate of Philip A. Tracy, if liable in any sum to the complainants, is liable only in the sum of $27,249.04, according to said

receipt given by Thomas Turner to Philip A. Tracy, the same being Exhibit T. M. T. No. 2.

7. The court below erred in overruling defendants' exception to the finding of the auditor that the burden of proof was upon the defendants to show that the primary liability of the estate of Philip A. Tracy should not be determined by the list of notes, Exhibit E. H. T. No. 22.

8. The court below erred in overruling defendants' exception to the refusal of the auditor to find that the burden of proof was on the complainants to show that the liability of the estate of Philip A. Tracy is to be determined by the list of notes, Exhibit E. H. T. No. 22.

9. The court below erred in overruling defendants' exception to the finding of the auditor that the estate of Philip A. Tracy is to be charged with the sum of $28,972.10 less $1,800, invested in real estate, and with $439.25, interest collected, and with $3,069.65 realized from said real-estate investments.

10. The court below erred in overruling defendants' exception to the finding of the auditor that Tracy's estate is chargeable with interest from the 30th of November, 1888, to the date of his accounting, on the amount for which the auditor found said estate to be primarily liable.

11. The court below erred in overruling defendants' exception to the refusal of the auditor to find that the estate of Philip A. Tracy is not chargeable with interest on the moneys and notes paid and delivered by Philip A. Tracy to Thomas M. Turner on the 30th day of November, 1888.

12. The court below erred in overruling defendants' exception to the finding of the auditor that the estate of Philip A. Tracy should not be allowed credit for the payment made by Thomas M. Turner to Erle H. Turner on the 10th day of April, 1891, amounting to $1,200.

13. The court below erred in overruling defendants' exception to the refusal of the auditor to credit the estate of Philip A. Tracy with said sum of $1,200 paid by Thomas

M. Turner to Erle H. Turner on the 10th day of April, 1891.

14. The court below erred in overruling defendants' exception to the finding of the auditor that the estate of Philip A. Tracy was not entited to credit in an amount equal to the value of the interest of Philip A. Tracy in square 649, assigned by Philip A. Tracy to Erle H. Turner (said assignment being Exhibit E. H. T. No. 13, Rec., p. 207), and the value of said square being $18,000 according to the stipulation of counsel (Rec., p. 357).

15. The court below erred in overruling the exceptions of the defendants to the finding of the auditor that the estate of Philip A. Tracy is not entitled to credit for moneys expended by Thomas M. Turner for the maintenance, support, and education of Wilmer Turner from November, 1888, to June, 1890, at the rate of $20 per month, amounting to $360.

ARGUMENT.

I.

The bill of complaint should have been dismissed because of the fatal variance between the pleadings and the proof.

The bill of complaint is framed upon the theory that Philip A. Tracy was trustee for Silas H. Turner as to the fund of $28,972.10 which Turner placed in his hands, and that after Turner's death he became trustee for the complainants, legatees under the will of Silas Turner, retaining this entire fund in his own possession, and that this entire fund, principal, interest, and profits, continued in Tracy's possession down to the time of his death, and has now come into the hands of his executors, the defendants.

The primary object of the bill was to impress the fund in the hands of the defendants with the trusts in favor of the complainants, on the ground that the trust fund had been followed and specifically traced into the hands of these defendants, the executors of Philip A. Tracy.

Thus it is alleged in paragraph six of the bill of complaint that the complainants "are informed and believe that at the time of the writing and execution of said will (of Silas Turner) and continuously thereafter, and at the time of the death of said Silas H. Turner, and continuously thereafter, up to the death of Philip A. Tracy, the said Tracy was and continued to be in the possession of the entire estate of said Silas H. Turner, which consisted, at or about the time of the death of said Turner, of promissory notes of various persons, secured by deed of trust upon real estate in this District, and of interest in money accruing due and payable thereon, and amounting in the aggregate to about thirty thousand dollars" (Rec., p. 3).

Again, in the tenth paragraph of the bill of complaint it is alleged that Tracy never accounted to the complainants for these funds, "but that on the contrary the said Tracy retained in his possession, down to his death, with the exception of the fourteen hundred dollars aforesaid, the entire trust fund, principal, interest and profits, *and the same have come into the possession of the defendants, his executors*" (Rec., p. 5).

In the eleventh paragraph of the bill of complaint it is alleged that Tracy never denied the rights of the complainants to said fund or his trusteeship with reference thereto (Rec., p. 5).

See also the third, sixth, and seventh prayers for relief (Rec., p. 9).

The defendants in their answer deny that the alleged trust fund continued in Tracy's possession and has come into their own possession. See answer of the defendants, paragraphs six, seven, and ten (Rec., pp. 12 and 13).

The proofs show conclusively, and complainants do not now deny, that the great bulk of the so-called trust fund did not continue in the possession of Tracy up to the time of his death, and did not come into the possession of the defendants, but was paid over by Tracy to the father of the complainants ten years before Tracy's death. (See Rec., pp. 211–212.)

This *fact* was thoroughly known and understood by the complainants and their counsel before the filing of the bill of complaint. Thomas Turner, in a letter to his daughter, Wilmer Turner, under date of February 17, 1899, explained the payment of more than $24,000 to him by Tracy (Exhibit T. M. T. No. 17, Rec., p. 233). The bill of complaint was filed June 10, 1899.

The distinct issue raised by the bill and answer and replication is: Did this fund continue in Tracy's possession up to the time of his death and come into the hands of the defendants as executors?

On the other hand, the distinct issue raised by the testimony, and in the argument on the final hearing, in respect of the bulk of the trust fund is: Was the payment, made by Tracy to Turner as natural tutor and guardian of his minor children, a valid discharge *pro tanto* to Tracy?

The issue thus raised as to the lawfulness of the payments made by Tracy, and the collateral issues of fact concerning the compliance or non-compliance by Thomas Turner with the laws of Louisiana, were inconsistent with and repugnant to the issue distinctly presented by the averments of the bill.

In this situation the well-known rule which prevails in equity, no less than at law, that a complainant can recover only upon the case and the theory of the case stated in his bill, must be applied. The complainants in this case can not be allowed to introduce new issues of fact in the testi-

mony or arguments, nor can they recover on a theory different from that set out in the bill.

Miller's Equity Procedure, sec. 95.
Small *vs.* Owings, 1 Md. Ch., 363–368.
Manchester *vs.* Matthewson, 3 R. I., 237, 260.
Crockett *vs.* Lee, 7 Wheat., 525.
Eyre *vs.* Potter, 15 How., 42.
Ferraby *vs.* Hobson, 2 Phillips Ch., 255.
Glascott *vs.* Lang, 2 Phillips Ch., 310.
James *vs.* McKernon, 6 Johns., 543.
Peckham *vs.* Buffam, 11 Mich., 529 (530).
Bradley *vs.* Converse, 4 Cliff., 366.

The reason for the rule that a court of chancery decrees only *secundum allegata et probata* is stated by Chancellor Johnson in Small *vs.* Owings (1 Md. Ch.. 363, 368), as follows:

"This rule is not only necessary to prevent surprise, but the abrogation of it would enable the complainant to take from his adversary the benefit of his answer, which, if responsive to the averments of the bill, would require a stronger measure of evidence to overcome, than if the fact to be proved was not noticed in the pleadings.

"In the treatise of Mr. Justice Story, already referred to, sec. 264, the rule is pressed still further; it being there said, 'that if an admission is made in the answer it will be of no use to the plaintiff, unless it is put in issue by the bill; and the consequence is, that the plaintiff is frequently obliged to ask leave to amend his bill, although a clear case for relief is apparent upon the face of the pleadings.'"

In *Manchester vs. Matthewson* (3 R. I., 237, 260), which was a suit for an accounting between alleged partners, the bill charged that certain property was conveyed to the defendant as trustee and receiver. The answer denied this, but on the hearing the complainant attempted to establish on the evidence a resulting trust.

The court said (p. 261):

"Whether, then, there be a resulting trust in the respondent, is not now the question made or to be tried. * * * Sufficient for this case is it, that the complainants have not proved the estate to be held on the trusts set out in the bill, but that this is disproved by the respondent's answer."

In *Eyre vs. Potter* (15 How., 42), which was a bill in equity filed by a widow, charging actual fraud and undue influence on the part of the defendants in procuring her signature to a contract whereby she abandoned her rights to her husband's estate for an inadequate consideration, the court, per Daniell, J., held that, on a failure of proof of actual fraud, no relief could be granted on the theory that the contract was procured through constructive fraud—and this, although the relief to be granted, apparently the cancellation of the contract and an accounting, would be the same in either case.

The court said (at page 56):

"Although cases of constructive fraud are equally cognizable, by a court of equity, with cases of direct or positive fraud, yet the two classes of cases would be met by a defendant in a very different manner. It seems to be an established doctrine of a court of equity, that when the bill sets up a case of actual fraud, and makes that the ground of the prayer for relief, the plaintiff will not be entitled to a decree, by establishing some of the facts quite independent of fraud, but which might of themselves create a case under a totally distinct head of equity from that which would be applicable to the case of fraud, originally stated." Citing Price *vs.* Berrington, 7 E. L. & Eq., 254, which was a suit to set aside a conveyance on the ground of actual fraud and lunacy. Only lunacy and a case of constructive fraud was made out, upon which the bill was dismissed on account of the variance.

In *James vs. M'Kernon*, 6 Johns., 543, a bill was filed for discovery and account charging that defendants had obtained possession of the personal estate of complainant's

intestate and refused to deliver it to them. The answer set up an assignment to one of the defendants for purposes of collection, etc. It was attempted on the hearing to have the assignment set aside because of fraud, and the court below granted the relief asked. But the Court for the Correction of Errors *reversed* the decree of the court below on the ground that the relief given must be in accord with that prayed in the bill, and there was no allegation in the bill that the assignment or agreement was void because of fraud in its procurement. In delivering an opinion, Kent, C. J., said (at page 561):

"The good sense of pleading and the language of the books both require, that every material allegation of this kind should be put in issue by the pleadings, so that the parties may be duly apprised of the essential inquiry, and may be enabled to collect testimony, and frame interrogatories, in order to meet the question. Without the observance of this rule, the use of pleading becomes lost, and parties may be taken, at the hearing, by surprise.

"If a defendant by his plea, or answer, offered new matter, the complainant formerly used to reply specially, and the pleadings might go on, as at law, to a rebutter; but special replications are now out of use; and the plaintiff is to be relieved according to the bill. But if the complainant conceives, from any matter offered by the plea or answer, that his bill is not properly adapted to his case, he may obtain leave to amend his bill, and suit it to the defence, or he may file such a supplemental bill (Mitf. 19, 255)."

Bradley vs. Converse (4 Cliff., 366), an important case in which eminent counsel were engaged, was ordered by Mr. Justice Clifford to be reargued on the sole question as to whether there was a variance between the pleadings and the proof.

In that case the bill of complaint proceeded upon the theory that the respondent undertook, on behalf of the rail-road company for which complainants were assignees, to take up and pay the outstanding bonds of the Norfolk

county railroad with funds which the railroad company placed in their hands in the shape of bonds. The bill charged that the respondents bought many of the bonds at less than par and charged the railroad company full value, and that they made extortionate charges.

The proof showed that the respondents acted in the premises without any authority whatever, and that they were accountable on other grounds than as agents or trustees. Mr. Justice Clifford held, in a carefully written opinion, that, although it was established by the proof that the respondents were accountable to complainants, it was on a different theory from that set up in the bill, and because of the variance the bill was dismissed without prejudice.

In *Crockett vs. Lee* (7 Wheat., 522, 526) Chief Justice Marshall, in applying this principle in a case in which it was sought to establish in the proof a defect in title not alleged in the bill, said:

"The counsel for the appellant says it would be monstrous, if, after the parties have gone to trial on the validity of the entry, and have directed all their testimony in the circuit court to that point, their rights should be made to depend in the appellate court on a mere defect in the pleadings, which had entirely escaped their observation in the court where it might have been amended, and the non-existence of which would not have varied the case.

"The hardships of a particular case would not justify this tribunal in prostrating the fundamental rules of a court of chancery; rules which have been established for ages, on the soundest and clearest principles of general utility. If the pleadings in the cause were to give no notice to the parties or to the court of the material facts on which the testimony was to depend, no notice of the points to which the testimony was to be directed, and to which it was to be limited; if a new case might be made out in proof, differing from that stated in the pleadings, all will perceive the confusion and uncertainty which would attend legal proceedings, and the injustice which must frequently take place. The rule that the decree must conform to the allegations, as well as to the proofs of the parties, is not only one which justice

requires, but one which necessity imposes on courts. We cannot dispense with it in this case."

It will be argued that this rule has no application to the present case for the reason that the bill alleged and the evidence established that Tracy was *trustee* for the complainants, and was accountable to them for the moneys which came into his hands, no matter what disposition he made of those moneys, whether he retained them in his own possession or whether he paid them over to Thomas M. Turner or any other person not legally entitled to receive them; that, in this aspect of the case, the allegations that Tracy *retained* the moneys received by him from Silas Turner, and that they have come into the possession of the defendants, are immaterial and therefore not required to be proved.

The *gist* of the present suit, it is contended, is Tracy's breach of trust, whether that is to be considered as the wrongful retention of the money, or the wrongful disbursement of it, and, having established a breach of trust, the complainants are entitled to the relief prayed.

The answer to this contention is twofold:

1. Assuming, for the purposes of the argument, that there was a breach of trust on Tracy's part, the contention of appellee would be sound if in truth the breach of trust were solely and alone the gist of the complainants' right to relief; but in this case it is not.

The right to the relief prayed and the extent thereof depend as well on the *nature* of the breach of trust as on the breach of trust itself.

The liability and the extent of the liability of a trustee who wrongfully retains the trust fund in his own possession, so that at his death it comes, with all its increase, into the hands of his executors, is essentially different from that of one who makes a wrongful disposition of it to one not entitled to receive it, just as it is different, again, from the

liability of a trustee who is guilty of negligence in the management of the trust estate.

If it were shown in the proof, as it is alleged in the bill, that the *whole* trust fund—principal, interest, and profits—continued in the possession of Tracy and has come into the possession of the defendants, then, so far as the original property could be traced, the complainants would be entitled to that specific property, together with all profits made thereon; and if it could be shown that Tracy invested the proceeds of all Silas Turner's notes in real estate, which had subsequently greatly increased in value, it is not doubted but that the complainants would be entitled to that real estate, whatever its value might be; and if, on the contrary, Tracy had while using due care lost any part of the trust property through no fault of his own, then the loss would have fallen, not on Tracy personally, but on the complainants.

This principle, indeed, has been applied in this very case at the instance and for the benefit of complainants, for the auditor found that Tracy's estate was chargeable with the *profits* made on the sale of the "Maryland Avenue lots." These lots were listed in the Exhibit T. M. T. No. 2 (Rec., p. 221), the receipt given by Thomas Turner to Tracy, and valued at $1,800. There is evidence to the effect that Tracy in February, 1890, sold these lots, or his interest therein, for $3,069.25. These profits the auditor charges to Tracy's estate (Rec. No. 1460, p. 10) instead of charging simple interest on the $1,800, as on the rest of the estate.

This illustrates what the object of the bill really was—to trace the trust property into the hands of the executors of the trustee, to seize the trust estate, "principal, interest, and profits," as demanded in the bill, in the hands of the executors, and to impress it with the trust for the complainants.

This is the case the defendants were prepared to meet, and this is the issue which alone should have been tried,—not the issues pertaining to another and different sort of liabil-

ity to which Tracy may have been subjected—*i. e.*, the liability of one who made a *wrongful payment* of trust funds in his hands to one whom he was *led to believe* was authorized to accept them.

Again, the difference between the nature of the liability sought to be imposed on the estate of Tracy by the *bill of complaint* and that to which it is actually subjected, according to the evidence (assuming that there was a breach of trust), is clearly illustrated by considering the situation of creditors of Tracy's estate, if there were any.

If it were true that the whole of the trust fund—principal, interest, and profits—had come into the hands of Tracy's executors, then the complainants would be entitled to the whole of that fund, no matter how large it might be and no matter whether it consumed the whole of Tracy's estate, to the exclusion of creditors.

But if, as is the case made out by the evidence, the complainants are merely entitled to an accounting of moneys expended, then the rights of creditors are better secured; for if they had specific liens on Tracy's property, it is clear that they would have priority over the claim of complainants, which would probably not be the case if his estate were to be impressed with the trusts demanded in the bill.

2. The second answer to the contention of appellees is found in the reasons which actuated them in framing their bill as they did.

It has been seen that the *fact* that Tracy paid over the bulk of the alleged trust fund to Thomas Turner was well known to complainants at the time of filing their bill, if not long before (Rec., p. 233).

Why, then, it may be asked, did the complainants sign and swear to a bill alleging as a *fact* (not a conclusion of law) that Tracy *retained* in his own possession the *whole* of the trust fund, "principal, interest, and profits," and that

the same has come into the hands of the defendants, his executors, when they knew this was not the fact?

What was to be gained by framing a bill on a theory not supported by facts?

The answer is plain. It was for the very purpose of postponing the real issue, of raising an issue on the evidence, instead of on the pleading, of compelling the defendants *in their testimony* to assume the burden of proving that the payment to Thomas Turner by Tracy was a valid discharge to him. And this is what the defendants have in fact been compelled to do.

The proper course of pleading would have been, of course, according to the older mode, to have anticipated the defense of the payment to Thomas Turner, to have alleged the *fact* of such payment and to have averred that it was unlawful and not a valid discharge to Tracy. (This is *suggested* in the twenty-first paragraph of the bill (Rec., p. 8), but not done.) Or, according to the modern practice, on the coming in of the answer to have amended their bill in accordance with the facts.

Having done neither, the defendants properly assumed that the case was to be determined by the *issues raised by the bill and answer*—the fact of the retention of the trust fund in Tracy's hands and its coming into the hands of his executors—and not on the issues raised by the evidence—whether or not the payment of the trust funds to Thomas Turner was or was not a valid discharge to Tracy, under the laws of Louisiana, and whether this question was to be determined according to the laws of Louisiana, Virginia, or the District of Columbia.

Mr. Justice Hagner, in delivering the opinion of the court below, did not fully understand this contention of appellants. He says:

"The further contention of the defendants is that, as none of the specifics described and enumerated in the list given by Tracy to Silas Turner ever came *nominatim* into the

hands of his executors, therefore no decree can pass in respect of those specifics or their value in the present case, as against the estate of the culpable trustee" (Rec., p. 27).

It is apparent, of course, that the learned justice does not here meet our contention that, because of the *variance* between the pleading and the proof, because of the failure of the complainants to establish by proofs the facts alleged in the bill on which the theory of the bill was based, the bill should be dismissed.

It is submitted that the present case is distinctly one for the application of the principle of equity pleading set forth above, which, says Chief Justice Marshall (*Crockett vs. Lee, supra*), "is not only one which justice requires, but one which necessity imposes on courts."

II.

Philip A. Tracy was not a trustee for Silas H. Turner, as to the funds in Tracy's hands belonging to Turner, at or before Turner's death, nor after his death did he become trustee as to said funds for the complainants, the children of Thomas M. Turner, beneficiaries under the will of Silas Turner.

As we have seen, the theory of the complainants' bill is that the fund bequeathed to complainants by the will of Silas Turner was in Tracy's possession at the time of Turner's death and continued in his possession until his, Tracy's, death, and that it thereafter came into the possession of defendants, his executors.

As we have also seen, as to the greater part of this fund, this theory has been exploded.

Under the first head of our argument we had occasion to make some inquiry as to the object of complainants in fram-

ing their bill as they did. We now wish to call attention to another purpose which was apparently in the minds of complainants in presenting their case.

A simple demand for money had and received is not, of course, a matter of equitable cognizance. There must be, to enable a claimant to prosecute a money demand in a court of equity, a "trust fund," a trustee, and a *cestui que trust*, or, owing to the existence of some *equitable* right, there must be some ground for equitable relief, as accounting, injunction, receiver, etc.

Now, as described in the bill, there exists, of course, a clear-cut *trust* in the funds which "have come into the hands of the defendant," and by reason of the existence of the trust a right to an accounting. By the bill an equitable title to the estate of Philip A. Tracy is made out. This was necessary to be done in order that the bill might not be demurrable, for, had the bill been framed in accordance with the *facts* as known to the complainants, it would have shown on its face that the case was not one to call into operation the powers of a court of equity, but was a simple demand by complainants against defendants for money had and received by defendants' testator, for the recovery of which there was to the complainants a full, adequate, and complete remedy at law, with no element of a trust, express or constructive.

1. *Tracy was not trustee for Silas Turner as to the funds in his hands up to the time of his (Turner's) death.*

The only account of Tracy's agency for Silas Turner is found in Tracy's "Instructions to executors" (Rec., pp. 15 and 293).

"Some time in 1871, Silas H. Turner of Virginia, whom I had known for a long time, of his own volition and without solicitation from me, came to the city and asked me to aid him in investing some twelve thousand dollars ($12,000) in real-estate notes. I consented and in a few weeks the

whole amount was invested, and he took the notes home with him. The interest was payable semi-annually, and, for a time, he sent me notes by mail about the time the interest was due so that it could be credited on the notes to satisfy the maker. This became irksome and, after a time, he brought me the notes, keeping a list of them, and asked me to keep them to save him the trouble of sending them to me by mail whenever the interest was due. I kept the notes in an envelope with his name upon it, and about twice a year sent him a memorandum of interest paid, and when the amount reached several hundred dollars I would buy another note, and send him a memorandum of the same. Also when a note matured and was paid, I would buy another note, unless he needed the money, which he rarely did, and sent him a memorandum of it. This condition continued until 1888, when he died in Virginia leaving his entire estate to the three minor children of his brother then living in Louisiana."

The relationship between these two men was not that of trustee and *cestui que trust*, but merely of principal and agent.

Ashley's Adm'r *vs.* Denton, 1 Little (Ky.), 86.
Adair *vs.* Winchester, 7 Gill. & J., 114.
Warner *vs.* McMullin, 131 Pa. St., 370.
Knox *vs.* Gye, L. R., 5 H. L., 656, 675.
2 Pomeroy Eq. Jurisp. (2d ed.), secs. 1044 and 1046.
Kershaw *vs.* Snowden, 36 Ohio St., 181.
Douglass *vs.* Martin, 103 Ill., 25.

"A trust is where there is such a confidence between the parties that no action at law will lie, but is merely a case for the consideration of a court of equity."

Stuart *vs.* Mellish, 2 Atk., 612.

Tested by this distinction, there is no element of a *trust* in the relations between Turner and Tracy beyond the *trust* that every principal has in his agent, every bailor in his bailee. Turner's confidence in Tracy was not "such a confidence * * * that no action at law will lie," for it will

not be contended, we believe, that S. H. Turner might not have sued Tracy at law and recovered his property. Had the *legal title* to Turner's property been vested in Tracy, so that Turner would have been unable to assert his right and title thereto in a court of law, then, of course, there would have been "such a confidence * * * that no action at law will lie," and, consequently, a trust.

Lord Westbury, in Knox *vs.* Gye (*supra*), in clear language, points out the dangers of misusing the word "trust" and in extending its metaphorical to its legal sense. He says, in speaking of the supposed principle that a surviving partner is a *trustee* of the share of the deceased partner (p. 675):

"In like manner here the surviving partner may be called trustee for the dead man, but the trust is limited to the discharge of the obligation, which is liable to be barred by lapse of time. As between the express trustee and the *cestui que trust*, time will not run, but the surviving partner is not a trustee in that full and proper sense. It is most important to mark this again and again, for there is not a more fruitful source of error in law than the inaccuracy of language. The application to a man who is improperly and by metaphor only called a trustee, of all the consequences which would follow if he were a trustee by express declaration,—in other words, a complete trustee,—holding the property exclusively for the benefit of the *cestui que trust*, well illustrates the remark made by Lord Macclesfield, that nothing in law is so apt to mislead as metaphor."

The same distinction was clearly expressed in *Ashley's Adm'r vs. Denton* (*supra*), which was a suit in equity filed to procure the restoration of certain slaves which defendant had held for the use and benefit of complainant.

The court, in speaking of its jurisdiction, said (p. 88):

"It is true that uses and trusts are a favored part of the jurisdiction of the chancellor, and frequently he will, on that ground, decide in cases where the law may be adequate to give relief. But, notwithstanding this acknowledged authority, it cannot be extended to every case where one party

has trusted another, or in other words, placed a confidence which has been abused. If so, every case of bailment, and every instance of placing chattels, by loan or hire, would be swallowed up by courts of equity. * * * *It ought, then, to be confined to cases of controlling legal rights, vested and remaining in trustees created as such in some proper mode, and not to be extended to all cases of abused confidence.*" (The italics are ours.)

The same rule was applied in *Adair vs. Winchester* (*supra*), which was a bill in equity by an assignee in bankruptcy to recover a pledge placed with defendants by the agent of complainants; also in *Douglass vs. Martin* (*supra*), which was a suit in equity to recover a sum of money placed in the hands of a stakeholder. In the latter case the court said (p. 30) that, in order to constitute a trust:

"It (the act or agreement creating the trust) must either vest an equitable title in or create a lien in favor of the beneficiary and this must be either by agreement of the parties, or under such circumstances as equity will declare a lien exists."

In the present case, as between Silas Turner and Tracy, there was neither agreement nor any circumstances to create a trust, or even raise a presumption of one—there was a mere *agency*, a mere *bailment*.

2. Justice Hagner, however, rejects this view of the case, and holds that the "testimony as to the entire course of dealings between Silas Turner and Tracy sufficiently establishes that their relations throughout were those of trustee and *cestui que trust*," and he cites several cases in support of his view (Rec., p. 27).

None of these cases support the principle laid down by the learned justice that "whoever receives property or money to be paid to another, or to be applied to a particular purpose, is answerable as trustee, and may be sued at law or in equity if he does not apply it accordingly."

In *Taylor vs. Benham* (5 How., 233) the question involved was as to the liability of an executor, who had duly qualified, to the *cestui que trust*, on a sale of trust property, held by his testator on express trusts.

In *Inglis vs. Snug Harbor* (3 Peters, 99), again, the questions related only to a devise of realty in trust.

And *Hinkle vs. Wanzer* (17 How., 353), which was a bill in equity filed to restrain proceedings under a judgment at law, pertained only to a question of equitable assignments.

In none of these cases were the respective jurisdictions of courts of law and equity considered or determined.

Nor does Story, cited by the learned justice (secs. 461 to 465), sustain his assertion that "the peculiar propriety of recourse to equity for the settlement of the entire controversy in such a case in one suit, is fully recognized by the authorities."

Story, in speaking of the jurisdiction of equity in cases of *account*, points out that such suits lie by a principal against an agent in cases of mutual accounts, and even in cases in which there is a single transaction between principal and agent (1 Story, sec. 464; 13th ed.). But he limits and defines this rule as follows:

"Perhaps the doctrine here laid down, though generally true, is a little too broadly stated. The true source of jurisdiction in such cases, is not the mere notion of a virtual trust, for then equity jurisdiction would cover every case of bailment. *But it is the necessity of reaching facts by a discovery; and having jurisdiction for such a purpose, the court, to avoid a multiplicity of suits, will proceed to administer the proper relief.*"

The present case, as we have shown, was not one for discovery, since all the facts were, before suit filed, better known to complainants than to defendants; nor was it one for account, since there was a single admitted fund in Tracy's hands belonging to Silas Turner.

It was, on the facts (not on the allegations of the bill,

which have not been sustained), simply a case as between Silas Turner and Tracy, of principal and agent, not of trustee and *cestui que trust*, and Turner could have had, by his action at law, a remedy, full, adequate, and complete, if Tracy had misappropriated his funds.

3. *Upon the death of Silas Turner, Tracy did not become trustee for complainants, the beneficiaries under Silas Turner's will.*

Upon the death of Silas Turner, the relation of principal and agent was, of course, terminated at once, and Tracy was, except as his duties were affected by Turner's will, in the position merely of holding funds belonging to Turner's *estate*.

But by his will Silas Turner bequeathed all his property to the four children of his brother, Thomas M. Turner (the complainants), and the will appointed "Philip A. Tracy to distribute the proceeds of said property equally between them" (Rec., p. 265).

This will was thus drawn at Washington on April 30, 1888, by Tracy at Turner's request (Rec., p. 265).

Now it is to be noted that this will did not make Tracy executor, nor did it, in terms, make him a *trustee*. No trust was created by the will. Tracy did not thereby acquire the legal title to Turner's property in his hands; he was given no power of investment or control over the property, and he was given no discretion as to the time or mode of payment. In short, there was imposed upon him, by Turner's will, the simple legal duty of paying the money to the persons entitled.

For a breach of this duty the full, adequate, and complete remedy of the complainants was and is a suit at law, to be brought by an administrator, with the will annexed, of Silas Turner.

The case of *Doyle vs. Murphy* (22 Ill., 502) is in its facts,

and in the application of the law, almost exactly similar to this.

In that case, Catherine Byrne, in Ireland, in the conduct of her business, entrusted certain funds to Maurice Doyle, who acted as her agent. Doyle absconded with the funds entrusted to him and went to America in 1834. Catherine Byrne died in 1849, and by her will left her property to her daughter, Honora Murphy, and her husband. In 1851 Maurice Doyle died intestate at Springfield, Ill., and left large amount of property. Honora Murphy and her husband filed a suit in equity against the administrator, heirs and next of kin of Doyle, asking for an account of the funds of Catherine Byrne that had come into his hands. By a reference to the auditor it was found that $17,000, principal and interest, was in the hands of Doyle's administrator, and the court, confirming the auditor's report, entered a decree against his estate for that amount. This decree was *reversed* on the ground that equity had no jurisdiction to declare the funds in the hands of the administrator subject to the trust, and that complainants had a full, adequate, and complete relief at law. In reply to the argument that Doyle was a trustee, the court says (p. 508): "That the court has such jurisdiction in cases of strict trust, there is no doubt. But it does not therefore follow, that the court will assume jurisdiction in every case where a mere confidence has been reposed or a credit given." The court then goes on to show that in the ordinary affairs of life where a confidence is reposed or a trust entertained that such a trust is not thereby necessarily created as will authorize a court of equity to entertain jurisdiction. In such cases the remedy is by suit at law.

In reply to the argument that equity has jurisdiction on the ground that the money in the hands of Doyle was bequeathed by Catherine Byrne to Honora Murphy, the complainant, the court said :

"We have not been referred to any case, nor is it believed that any such exists, where it has been held, that where a testator bequeaths a debt due him to a legatee, that he may resort to a court of equity.

"* * * By virtue of this bequest from her mother, she (Honora Murphy) did not acquire the relation, to the administrator of Maurice Doyle, of a *cestui que trust.* She by that will became the executor if she obtained the letters testamentary, and thereby became the creditor of Maurice Doyle's estate."

It is submitted, on the authority of this case and on the well-defined principles of equity jurisprudence as laid down therein, that Tracy was never a *trustee,* as to the funds in his possession belonging to Silas Turner or his estate, for the complainants, and that a court of equity has no jurisdiction, in the absence of this ground of equitable interference, to grant relief to the complainants in this case.

The complainants should be left to their remedy at law, which is full, adequate, and complete.

III.

The payment made November 30, 1888, by Tracy to Thomas Turner as "natural tutor and agent for his minor children" (Exhibit T. M. T. No. 2, Rec., p. 221), was made in good faith by Tracy and at the solicitation and by reason of the representations of Turner and was a complete and valid discharge pro tanto to Tracy against subsequent demands made on him by the complainants.

The three propositions which we advance under this defense are:

1. The payment of November 30, 1888, by Tracy to Turner was made at the request and by reason of the representa-

tions of Turner, and was, on Tracy's part, made in good faith, and not with the purpose of personal profit.

2. According to the laws of Louisiana, Thomas Turner, as father of the complainants, had the right to the possession and enjoyment of the estates of his minor children during their minority.

3. Tracy's voluntary payment to Turner of the funds in his hands belonging to the complainants who lived in a foreign jurisdiction was valid, since, according to the laws of that jurisdiction, the person to whom the payment was made (the father) had the right to receive the money, and a receipt given by the father is a valid discharge and acquittance to Tracy.

These three propositions we will consider in their order:

1. *The payment of November 30, 1888, by Tracy to Turner was made at the request and by reason of the representations of Turner and was, on Tracy's part, made in good faith and not with the purpose of personal profit.*

It will be necessary to examine more closely the circumstances under which this transaction took place.

On the 28th of September, 1888, Thomas Turner, *accompanied by his lawyer, Eppa Hunton*, came to Washington bringing with him the list of notes, Exhibit E. H. T. No. 22. They found Tracy at the post-office, where he was employed as a clerk, and presented the list to him. Turner describes this interview as follows:

"I showed him this paper and told him my brother had told me he had these notes described in his list in his possession for my brother and I wanted to know about it. He said it was all correct, that he had the notes, all of them in his possession and that the notes were as good as gold. I believe that was his expression.

"He then told me he had just gotten leave of absence and was on the eve of going for a few weeks into the country for the benefit of his health, and that I could return to Virginia, and when he returned from the trip, he would notify me and I could come to Washington and we would have a settlement of the matter. He then turned to me and remarked that possibly I would need some money to discharge the funeral expenses, etc., and handed me some money," $439.25.

Tracy had not been informed of the death of Silas Turner (Rec., pp. 107, 108, *et seq.*).

Thereafter Turner went back to Virginia and stayed with his relatives until he received word about a month later from Tracy to come to Washington for the settlement. He came and met Tracy at the National hotel. At their conferences Tracy produced a second list of notes (Ex. T. M. T. No. 1) and asked Turner whether a settlement according to that list would be satisfactory. Turner took this list and compared it carefully with the one in his possession (Ex. E. H. T. No. 22). He found the sum total of the second list to be less by several thousand dollars than that of the first list, and, as he called it, "some substitution of notes." He objected to this and refused to settle on the basis of the second list. Tracy thereupon told him that "he would not qualify as executor of the will and he said that if I attempted to qualify as guardian or administrator he was satisfied the heirs of my brother here in Virginia would contest the will. He furthermore told me there would be a good deal of cost attached to it, that I would have to give a bond, it seems to me of double the value of the whole estate and that would be difficult for me to do, he said, and he also said there would be a tax on it, a legacy tax, I understand—I did not know the law here—which would amount to several thousand dollars; and he wound up by stating that all that taken into consideration this amount would be more, perhaps, than I would get clear if I were to administer on it. He then remarked that if I would settle by this list, he

would turn the property over to me without having anybody appointed as executor or administrator or guardian, and that we could put the notes in bank here and have them collected, and I could put the notes in bank here and have them collected, and I could get the means away from here as quick as possible and perhaps that would prevent the other heirs of my brother in Virginia from attempting to break the will" (Rec., pp. 111, 112).

To these arguments Thomas Turner yielded, and he signed the receipt, Exhibit T. M. T. No. 2 (Rec., p. 221), as "natural tutor and guardian of my minor children," which is like the list, Exhibit T. M. T. No. 1, in all respects, took the notes from Tracy and deposited them in the Second national bank. Turner's account with the bank is in evidence (Ex. T. M. T. No. 23, Rec., p. 243); also the checks by which money was drawn out (Ex. T. M. T. 23 (24), pp. 246–261).

The only other account of the payment of this fund to Thomas Turner appears in Tracy's "Instructions to executors" heretofore referred to. He says:

"In his will he named me to settle up the estate and divide the money among the children; but, as the laws of Virginia require two witnesses to a will, and says neither of them shall be an executor I could not qualify, and as the father, if appointed, could not have given the bond, I handed him the package of notes, advised him to deposit them in the Second National Bank of Washington, D. C., which he did, and agreed to look after them and have them all paid, he being out of the city" (Rec., p. 15).

We submit that Turner's testimony to the effect that the payment to him was made at Tracy's request, and because of his representations as to the probable cost of administration, the necessity of giving a bond, the payment of a legacy tax and the probability of Silas Turner's relatives contesting the will, was a gross contortion of the truth in obvious contradiction to the clearest inference from admitted facts.

(1.) *As to the threatened contest of the will by Silas Turner's relatives, Turner swore that just after the death of Silas Turner he did not communicate to his relatives in Virginia knowledge of the will of Silas Turner, but concealed it from them* (Rec., p. 115).

The truth was that almost immediately after the death of Silas Turner *his will was read aloud by Thomas M. Turner in the presence of Robert S. Rust, Justin E. Sowers, and W. H. Kerfoot* (Rec., pp. 302, 315).

Turner's false statement was evidently made for the purpose of making the court believe that, his relatives having no knowledge of the will from him, the threat that they would contest the will must have originated with Tracy, and was a part of his scheme to extort money from Turner.

It is obvious, on the contrary, that it was Turner who, fresh from his relatives in Virginia, among whom there was some talk of contesting the will, imparted this information to Tracy as an inducement to pay over the money at once and without the delay incident to the appointment of an executor.

(2.) *As to Tracy's alleged representations as to the cost of probate, necessity of giving bond, and legacy tax.*

It is far more probable and more consistent with the facts that Turner used these arguments to Tracy than Tracy to Turner.

Turner had been a clerk of a county court in Louisiana. Therefore the legal presumption that he knew the law is strengthened into a presumption of fact.

Furthermore, Turner was acting under the advice of his lawyer, Eppa Hunton. Therefore he would almost necessarily be completely informed as to the cost of being appointed executor, as to the necessity of giving bond, and as to the payment of the inheritance tax. It is impossible to

believe that he could have consulted with Eppa Hunton about the probate of the will without discussing these very things that he says Tracy told him about.

It is true that Tracy, in his "Instructions," says that the reasons which actuated him in handing the fund over to Turner were those which Turner sets forth, but there is nothing in his "Instructions" to show that he did not derive his information as to these matters from Turner, as was natural.

(3.) But Turner's crowning piece of effrontery, which characterizes all his testimony, is his account of signing the receipt, Exhibit T. M. T. No. 2, as "natural tutor and agent for my minor children."

When asked what he meant by signing as "natural tutor and agent for his minor children" he said:

"*I did that at Mr. Tracy's dictation, his suggestion.* I supposed he meant (I know I meant) that I was their natural protector. That was all" (Rec., p. 137).

Can this court believe that signing as "natural tutor" was a suggestion of Tracy's rather than Turner's own idea? In all probability Tracy never heard of any other use of the word "tutor" than as "teacher"; but under the laws of Louisiana, whence Turner had just come and where he had been clerk of a court, the word "tutor" has its own special and peculiar significance, and "*natural* tutor" has a still more special significance.

It is impossible to escape the conclusion that Turner's signing as "natural tutor" was a part of his scheme of getting the funds of Silas Turner's estate into his own hands, *and that by so signing he induced Tracy to believe that payment to him* was lawful and regular.

But it is pointed out by counsel for complainants, as evidence that Tracy extorted from Thomas Turner a large part of S. H. Turner's estate, that Tracy, by his own confession,

in his "Instructions" and in his letters to Erle Turner and to Mrs. Turner, retained for his own benefit and behoof a large sum of money.

It is difficult to reconcile the fact that Tracy always freely admitted to Erle and Mrs. Turner that he held some property of the S. H. Turner estate for the children with the contention of counsel that he *stole* this plunder or took it by force and threats. A thief does not openly admit possession of stolen goods.

The simple fact is that Tracy, as he stated in his "Instructions," handed over to Thomas *most* of the estate of S. H. Turner. He retained in his possession *only* the property invested in the "Maryland Avenue lots" amounting to $1,800. This item appears in Exhibit T. M. T. No. 2.

Out of the property so retained Tracy paid over to Erle at different times $1,350 (Rec., pp. 212, 213).

Another argument of appellees to show bad faith on Tracy's part and the profit he made out of this transaction is found in his alleged charge of $6,000 as "commissions."

There is no evidence that Tracy actually received $6,000 or any other sum as a commission. The only reference to it by him is in a letter to Thomas Turner dated May 7, 1892, in which he says:

"As I am now all alone in the world and have not much use for much money I have thought something of transferring to Miss Henrietta a part or perhaps all of the commission I charged on your brother's estate (5%), as she was left out in the will, and is poor as I understand it, and getting along in years.

"If you will confer with her upon the subject, and ask her to write to me, I think the arrangement can be arranged.

"This amount of my charge for attending to the business for 16 years ($120 a year) will stand" (Rec., p. 213).

Turner states that Tracy never said anything else about his commission, either before or after that letter (Rec., p. 118).

That he ever actually received or retained any sum of money as commissions does not appear. Certainly the mere fact that he said he *would* charge a commission, or that the amount of his charge *would stand*, is not sufficient proof to establish the charge, over and above the other moneys which he is shown to have possessed and for which he is accountable.

Because of his obvious misstatements of fact, because of his interest in the cause, we submit that Thomas Turner's statements must be taken most strongly against him; and solving the mystery as to the motives of the payment of $26,000 by Tracy to Turner, we must give, in Tracy's favor, who is not here to speak for himself, every fair inference from the established facts.

From these facts every inference points to the conclusion that it was Turner who induced Tracy to pay over the money to him, urging as reasons the cost of probate and administration, the necessity and difficulty of giving bond, the payment of the inheritance tax, and above all the *chief and persuading reason that, under the laws of Louisiana, Turner, as "natural tutor for his minor children," was competent to receive money for them, and to give a valid receipt therefor.*

This brings us to our second proposition:

2. *According to the law of Louisiana, Thomas M. Turner, as father of the complainants, had the right to the possession and enjoyment of the estates of his minor children during their minority.*

The following are the provisions of the Revised Civil Code of Louisiana of 1870, in force in 1888, at the time when Turner, on behalf of his children, received the moneys belonging to S. H. Turner's estate from Tracy, governing the rights of the father to the property of the children:

Book I, title VII, ch. 5, under the heading "*Paternal authority:*"

"*Article 221* (art. 267). The father is, during the marriage, administrator of the estate of his minor children.

"He is accountable both for the property and revenues of the estate, the use of which he is not entitled to by law, *and for the property only of the estate, the usufruct of which the law gives him.*

"This administration ceases at the time of the majority or emancipation of the children."

"*Article 222.* Property belonging to minors, both of whose parents are living, may be sold or mortgaged, and any other step may be taken affecting their interest, in the same manner and by pursuing the same forms, as in the case of minors represented by tutors, the father occupying the place and being clothed with the powers of tutor.

"An undertutor *ad hoc* shall be appointed by the court, contradictorily with whom the proceedings shall be carried on."

"*Article 223* (art. 239). *Fathers and mothers shall have during marriage the enjoyment of the estate of their children until their majority or emancipation.*"

Article 224 (art. 240). The obligations resulting from this enjoyment shall be:

(1.) The same obligations to which usufructuaries are subject.

(2.) To support, to maintain, and to educate their children according to their situation in life.

Under the heading "Of Usufruct," etc., Book 2, title III, we have the following definitions and rights and liabilities of usufructuaries set forth:

"*Article 533* (art. 525). Usufruct is the right of enjoying a thing, the property of which is vested in another, and to draw from the same all the profit, utility and advantage which it may produce, provided it be without altering the substance of the thing.

"*Article 540* (art. 532). Usufruct may be established by all sorts of titles, by a deed of sale, by a marriage contract,

by donation, compromise, exchange, last will, and even by operation of law.

"Thus a usufruct to which a father is entitled on the estate of his children during the marriage is a legal usufruct.

"*Article 589* (583). Fathers and mothers who enjoy the legal usufruct of the property of their children are bound to support the expenses of all suits concerning that property, in the same manner as if they were the owners of it."

It is clear from these plain provisions that, by the law of Louisiana, Thomas Turner *was vested with the usufruct of his children's estate* and the right to take possession of and administer it.

But it is pointed out by counsel for appellees that, as father having the right of enjoyment of his children's property, Thomas M. Turner was, by article 224 of the Code, subjected to the "*same obligations to which usufructuaries are subject.*"

Those obligations are found in articles 557 to 560, in Book II, title III, chapter 1, of the Revised Civil Code, and they consist principally in the filing in a certain formal way of an inventory by the usufructuaries and the giving of security for the faithful care of the property out of which the usufruct arises.

But according to article 560 these formalities are expressly rendered unnecessary in the case of a father and mother having the legal usufruct of the estates of their children.

"*Article 560* (art. 553). *Neither father nor mother having the legal usufruct of the estates of their children* * * * *is required to give this security.*"

The only substantial limitation on the parents' enjoyment of their children's property is found in the following provisions of the Code:

"*Article 589* (art. 583). Fathers and mothers who enjoy the legal usufruct of the property of their children are

bound to support the expenses of all suits concerning that property in the same manner as if they were the owners of it."

These provisions of the Code are construed and explained in the following cases:

Cleveland *vs.* Sprowl, 12 Rob., 172.
Handy *vs.* Parkinson, 10 La., 92.
Greenwood *vs.* City of New Orleans, 12 La. Ann., 426.
Snow *vs.* Copley, 3 La. Ann., 610.
Renfroe *vs.* Gates, 7 La. Ann., 569.
Succession of Allan, 48 La. Ann., 1240.

In *Cleveland vs. Sprowl* (*supra*) the question as to the infant's lien or mortgage on the property of his father as security for his faithful administration of the children's estate was raised, and, in pointing out that the parents are expressly exempted from giving security, the court said:

"Now, it is well known, that no tutorship exists, during the marriage, over the children issued from it, but that a child remains under the authority of his father and mother until his majority or emancipation. Civ. Code, art. 234. The father is, during the marriage, administrator of the estate of his minor children; he is accountable both for the property and revenues of the estate, the use of which he is entitled to by law, and for the property only of the estates, the usufruct of which the law gives him; and such administration ceases at the time of the majority, or emancipation of the children. Art. 267. The natural tutorship only takes place after the dissolution of the marriage, by the death of either of the spouses, and belongs of right to the surviving one. Art. 268. Thus it is clear, that the legal mortgage resulting from the tutorship, is not applicable to the administration of the minor's property, given by law to the father, during the marriage. He is not a tutor; his duties and responsibilities are very different; and the law does not appear to have intended, that while the minor's estate remains under his father's administration during the marriage, his child should have a legal mortgage upon his father's property, as a

security for the said administration. He is accountable, it is true, for his children's property and revenues; but art. 239 says, that fathers and mothers shall have, during the marriage, the enjoyment of the estate of their children; and art. 240 informs us, that the obligations resulting from this enjoyment shall be *the same obligations to which usufructuaries are subjected*, and to support, to maintain, and to educate, their children according to their situation in life. Now, on referring to art. 551, we find that a usufructuary must give security that he will faithfully fulfil all the obligations imposed on him by law; (art. 522;) that, in place of such security, he may give a special mortgage on his real property; (art. 555;) but art. 553 provides that '*neither the father nor mother having the legal usufruct of the estate of their children, is required to give this security;*' and they are consequently not bound to give a special mortgage.

"We must, therefore, conclude, that our law allows no mortgage on the property of the father, as a security for his faithful administration of his children's estate during the marriage; that the father and mother have the enjoyment of the children's estate, without being bound to furnish any security; and that the judge, *a quo*, did not err in refusing to recognize the mortgage rights prayed for by the appellant. It may be a hard case; and we should perhaps, as men, be disposed to sympathize with the feelings expressed by one of the appellant's counsel in his brief, and deplore the situation of a poor orphan whose estate has been squandered by his father, and who is left remediless after the latter's death. But such is the law. As judges we are bound to obey it; and we do not feel authorized 'to strain it a little,' as the counsel suggests, even were it for the sake of remedial justice."

In *Handy vs. Parkinson* (*supra*) the creditors of a surviving parent (the father) sought to levy execution on the property of the children in which he had, as it was claimed, the usufruct. But the court held that the father had this usufruct only *during marriage*, and that after the death of one of the parents the property is vested in the *tutor* of the child.

In *Greenwood vs. City of New Orleans* (*supra*) a testator bequeathed a share of his estate to the heirs of a woman (who

were her children), she to have the usufruct of it during her life. During the minority of the heirs there was a suit antered which resulted in a compromise judgment against the property in question, in which suit the infants were not represented. It was contended that they were not bound by the judgment. The court *held*, however, that they were bound because their mother was a party to the suit or represented in it, and she was entitled *by law* as well as by the will to the usufruct of the estate.

In *Snow vs. Copley* (*supra*) the right of Snow to act for his minor children was disputed on the ground that, the mother and father being both living, he could not be clothed with the capacity of tutor. The court said: "It is true that S. is not a natural tutor; but as the father of the minors he is, during the marriage, the administrator of their estate and competent to institute a judicial proceeding for its protection."

In *Gates vs. Renfroe* (*supra*) it was said: "Both under the civil and common law minors, while both parents are living, are subject exclusively to the authority of the father, who administers their property and is bound to provide for them and protect them in their person and rights."

Counsel for appellees rely greatly upon *Article* 3350, by which it is provided:

"Before fathers and mothers, who by law have administration of property belonging to their minor children, shall be allowed to take possession of such property and enjoy the profits and revenues thereof, they shall cause an inventory and appraisement to be made of such property, and cause the same to be recorded on the mortgage books of every parish in the State where they or either of them may have immoveable property."

But this provision is found in Book III of Modes of Acquiring Ownership of Things, title XII of Mortgages, ch. 2 of Inscription of Mortgages, and sec. 1 of the Mode and Effect of Recording Mortgages.

Construed, as it must be, with the context in which it is

found, it is obvious that this provision is not meant to limit the father's right to take possession of and administer his children's estate except in order to create a lien or mortgage on *his own* estate for the benefit of his children.

The father is still not required to give *security* for the faithful administration of the estate.

It is to be observed that, although certain formalities are prescribed before the father can take possession of his children's estate situated in Louisiana, such as the making and filing of an inventory, the right and title of the father to so take possession and administer is derived, not from an act of a court, but from the law itself. Immediately upon the children's becoming vested with the right of property, the father, by the act of the law, becomes vested with the rights of possession and use as usufructuary. While the father may not be aided in obtaining possession of his children's property situated in Louisiana by the courts until he has complied with the formalities prescribed by law, nevertheless his title as usufructuary is *complete*, without the intervention of the law, immediately upon his children's becoming entitled to property. No bond is required to be given or inventory filed before he becomes vested with the rights of usufructuary. This the law does for him *ex proprio vigore*. It is only when he attempts to collect property *in Louisiana* that he must comply with the requirements of filing an inventory. This distinction is important, for in the first place it is to be observed that, as to property situate outside of Louisiana, the extent and nature of which is unknown to the father, it is impossible to file an inventory until he gets the property into Louisiana. And, in the second place, if it be true, as we think is clear from the laws of Louisiana cited above, that the father is, by that law, clothed with *rights*, as usufructuary, in the property of his children, then, as such usufructuary, he is entitled to demand and receive, and may

give a good acquittance for, the property of his children situate in a foreign jurisdiction.

This brings us to our second proposition under this heading of our argument, which is, stated more broadly than above:

3. *A voluntary payment by a person having in his hands funds belonginy to persons living in a foreign jurisdiction is valid, if, according to the laws of that jurisdiction, the person to whom the payment was made had the right to receive the money; and a receipt given by such person is a valid discharge and acquittance to the person so paying the money.*

We wish at once to be understood as not controverting the principle that administration when had at all must be had within the jurisdiction in which a testator's will is filed, or within the jurisdiction in which his property was situated, and that, as to personalty, the law of the domicile of the owner applies.

This principle, however, has no application to the present case.

Beyond the filing of Silas Turner's will for probate, there was no administration of his estate in Virginia, and none in the District of Columbia, where the great bulk of his property was situated at the time of his death.

For excellent reasons, the fear of a contest of a will, the cost of administration, and the desire to get the property away from the grasp of Silas Turner's relatives in Virginia, all of which has been more fully explained above, it was agreed between Tracy and Turner, acting in his capacity as administrator of the estate of his children, that there should be no formal administration, but that, *Thomas Turner paying all the debts of the decedent*, the estate should be settled out of court.

Courts look with favor upon the private settlement of es-

tates, where there are no debts or where the claims of creditors are satisfied.

Akin *vs.* Akin, 78 Ga., 24.
McCracken *vs.* McCaslin, 50 Mo. App., 85.
Roberts *vs.* Messenger, 134 Pa. St., 298.
Foote *vs.* Foote, 61 Mich., 181.
Filbey *vs.* Carrier, 45 Wis., 469.
Burton *vs.* Brugier, 30 La. Ann., 479.

We do not deny that if Tracy had refused to pay over the moneys in his hands to Thomas Turner it would have been necessary for Turner to have qualified as administrator and to have complied with the formalities made by the laws of the District of Columbia prerequisites to the collection of assets by suit in this District.

But these principles leave untouched the heart of our argument, that Tracy's *voluntary payment* to Turner, authorized by the laws of Louisiana, the domicile of the owners of the funds, to demand and receive it, was a valid payment.

The case is exactly similar to those involving payments to foreign executors, in which it is almost uniformly held that a voluntary payment to a foreign executor is a good discharge to the person making the payment, even as against a subsequent demand by an executor appointed by the court in the jurisdiction in which the property was situated.

Doolittle *vs.* Lewis, 7 John. Ch., 45.
Williams *vs.* Storrs, 6 John. Ch., 353.
Parsons *vs.* Lyman, 20 N. Y., 103.
Bank *vs.* Sharp, 53 Md., 521.
Wilkins *vs.* Ellett, 9 Wall., 740.
Rand *vs.* Hubbard, 4 Met. (Mass.), 252.
Hutchins *vs.* Bank, 12 Met. (Mass.), 421.
Stevens *vs.* Gaylord, 11 Mass., 256.
Trecothick *vs.* Austin, 4 Mason, 6, 33.
Mackey *vs.* Coxe, 18 How., 104.

In *Doolittle vs. Lewis* (*supra*) the question presented was whether the administrators of A, a mortgagee with powers of sale, living in Vermont, were authorized to sell lands in New York under the power, and whether it was necessary to appoint executors in New York. Chancellor Kent held that it was not, because the matter was not jurisdictional, but was one of private agreement.

"An executor or administrator of a creditor dying in another State and becoming lawfully possessed, as part of his assets, of a bond given and secured upon lands in this State, is competent, as I should apprehend, to receive payment and give an acquittance without first resorting to the courts of probate here. * * * And is not the policy of the law sufficiently answered when our courts refuse to lend their assistance to any authority not derived from our own laws touching the administration and distribution of assets? If the parties can transact their own *business according to their own agreement, without asking the aid of our courts, why may they not lawfully do it?*"

In *Williams vs. Storrs* (*supra*) Chancellor Kent said that a voluntary payment by a debtor to a foreign administrator would protect him (p. 357).

In *Parsons vs. Lyman* (*supra*), where one of the questions was, whether a Connecticut administrator could collect (without suit) assets of the estate in New York, the court by Denio, J., after pointing out that personal property has no locality, but is subject to the law which governs the person of the owner, and that an executor may not maintain a suit in a foreign jurisdiction, says:

"But, if residents of this State have in their possession property which belongs to a party domiciled abroad, or are indebted to him, they may, of course, recognize any valid title claimed under him arising out of an act in pais, by testament or by succession upon intestacy, and *may voluntarily deliver over the property, or make payment of the debt.*"

The reasons for this rule are fully explained and *Doolittle vs. Lewis* and *Williams vs. Storrs* are cited.

In *Bank vs. Sharp*, 53 Md., 521, a bank in Maryland having stock belonging to decedent, who lived in Indiana, delivered it over to her executor, duly appointed by the courts of Indiana, although ancillary letters were not granted in Maryland. Subsequently suit was brought against the bank for the stock so paid over, by an executor appointed by the courts of Maryland. But the court held that the first payment was a valid discharge of the obligation, following the rules laid down in the preceding cases and in Wilkins *vs.* Ellitt, 9 Wall., 740.

The court further holds that the validity of such payment does not depend, as contended, upon the non-existence of debts against the deceased in the State in which payment is made.

Wilkins vs. Ellitt, 9 Wall., 740, is a leading case.

Q., a resident of Alabama, died there, and G. took out letters of administration. Wilkins, a resident of Tennessee, owed a sum of money to Q., and after his death paid it over to G. Subsequently a local administration, in Tennessee, was granted to Ellitt, who sued Wilkins for the money alleged to have been wrongfully paid over. It was held, reversing the lower court, relying on the cases cited above, that the voluntary payment to a foreign administrator was a valid discharge of the debt.

In *Rand vs. Hubbard* (*supra*) the executors of testator's estate under a will proved in New York sent a note payable to testator to a notary in Massachusetts for protest. The note was presented to the debtors (endorsers) in Massachusetts and was dishonored. Subsequently an executor *c.t.a.*, appointed in Massachusetts, sued the endorsers. The defense was that there had been no legal protest of note. The fundamental point to be decided was whether, if endorsers had paid the note to the executor before the probate of the will in Massachusetts such payment would be a valid discharge of the

obligation as to them. The court held by Shaw, C. J., that such payment would be good. In a very careful opinion he admits that for some purposes there may be a distinction between executors and administrators with regard to the validity of such payment, but strongly intimates that such distinction is not real and would not now be taken by the courts (pp. 255–256).

In *Hutchins vs. Bank* (*supra*) the testator, domiciled in New Hampshire, left his property to his wife (subsequently his executrix) with directions not to dispose of stock in a bank in Boston unless necessary. After her death the stock was to go to certain relatives. After several years she sold this stock and it was transferred on the books of the bank. Subsequently an administrator *d. b. n.* was appointed in Massachusetts and he brought suit against the bank for the alleged wrongful transfer of the stock. Shaw, C. J., said that question *of liability of the bank did not depend on its negligence in not knowing of provisions of the will and in not seeing to their execution, but upon the right of the executor to demand personal property situate in Massachusetts, and to give a valid discharge therefor.* And the court held that the executor had this right, that the receipt given by it was a valid discharge, and that the bank was not liable to the administrator *d. b. n.* appointed in Massachusetts.

After pointing out that an executor has the legal interest in the goods and chattels of the deceased, the court says:

"If, therefore, such an executor can take possession of goods and effects in the hands of a bailee or if he can collect a debt due from a debtor in another State, without the necessity, in either case, of commencing a suit, he has authority to do so, and may give a good acquittance and discharge."

In *Tricothick vs. Austin*, 4 Mason, 16, 33 (1825), Story, J., stated that before the American Revolution voluntary payments of debts and receipts under foreign administrations were

of unquestionable validity and released the debtors from further claim, and such payments were effectual in the United States; also after the Revolution, upon principles of national amity, relying upon Atkins *vs.* Smith and Doolittle *vs.* Lewis. Atkins *vs.* Smith, 2 Atk., 63, was a decision by Lord Chancellor Hardwicke, as follows:

"It was said in this cause by Lord Chancellor that ecclesiastical jurisdictions are limited within their particular district, and an administration taken out here will not extend to the colonies in America; but if an executor sends over an exemplification of probate to Maryland, or any other colony, the person who is employed as an agent there by the executor, may, by letter of attorney from him, collect in the effects of the testator, and he is chargeable as much as if the executor had got them in himself."

The rule deducible from these authorities and applicable to the case at bar is that Tracy's voluntary payment to Turner, who was authorized under the laws of Louisiana to demand and receive the property of his children, wherever situate, was a valid discharge, *pro tanto*, to Tracy against the subsequent demands made by Turner's children on Tracy.

IV.

The complainants, Erle and Wilmer Turner, are barred from the relief prayed by their acquiescence in the alleged breach of trust—the payment by Tracy of the funds in his hands to Thomas Turner—and by their laches in prosecuting their claims.

1. *Facts pertaining to Erle and Wilmer Turner's knowledge of alleged breach of trust.*

In apparent anticipation of the defense of acquiescence and laches, the complainants framed their bill on the theory, unfounded in fact, that the whole of the "trust fund," so

called, continued in Tracy's hands to the time of his death, and then came into the hands of his executors; and they, the complainants, were ignorant of any other facts pertaining to the "trust fund."

In paragraph 19 of their bill they allege:

"Complainants further show that they were in entire ignorance of all facts relating to said trust estate from the time of Silas H. Turner's death until about September, 1898, when the complainant, Erle H. Turner, accidentally learned of the death of said Tracy as hereinafter stated, and immediately engaged counsel to ascertain their rights. That these complainants resided in places remote from Washington. * * * That during all the time since the death of said Silas H. Turner these complainants have been without financial means and too poor to come to Washington and too ignorant of any facts to be able to advise with counsel, and that they were further induced to inactivity by the representations made by Tracy to their mother and the complainant, Erle H. Turner, that the trust funds were invested in land or in notes which were during all said time unsalable and uncollectible; *and, furthermore, the complainants were lulled into security by the assurances, made by said Tracy to complainant, Erle H. Turner, that he, Tracy, was doing the best possible for the interests of all these complainants, without once having denied the existence of the trust estate or their rights and his obligations in the premises with reference to said trust estate.*"

These allegations were not founded on facts, and were known at least to the complainants, Erle and Wilmer Turner, to be unfounded in fact at the time the bill was signed and sworn to.

The evidence shows that both Erle and Wilmer knew for several years prior to the filing of the bill that Tracy had turned over the bulk of Silas Turner's estate to their father.

They, or at least Erle, also knew that Tracy, in the letters referred to in the 19th paragraph of the bill, referred only to a small part of Silas Turner's estate which he admittedly re-

tained in his possession, and which is probably represented by the "Md. Ave. lots" in Exhibit T. M. T. No. 2.

Erle Turner testified on direct examination, in accordance with the sworn statements in the bill, that while he was living with the rest of the family at Minden, La., and while his father was in Virginia (September, 1888) his mother received a letter from his father, which was either shown or read to Erle, in which he stated that Silas Turner was dead and had left all of his property to his father (Rec., p. 45).

He first met Tracy in the National hotel in Washington in 1891, where he was introduced to him by his father, and that after that he saw him occasionally and corresponded with him (Rec., pp. 45–46).

He went from Washington to Philadelphia, and returned to Texas two years later to see his mother, which was the first occasion of seeing his father after the Washington visit. He did not see his father again until a day or two before the taking of his deposition.

After Silas Turner's death and up to the Tuesday before his deposition was taken, he never had any conversation with his father with reference to Silas Turner's estate (Rec., p. 46).

His father wrote him, however, shortly after April, 1891, to pay him, Erle, "so much money," certifying that $2,500 (he thinks), or more, of Silas Turner's estate had been invested in lots in Maryland avenue, which order Erle lost (Rec., p. 47).

Erle first learned that Silas Turner left his estate to the children of Thomas Turner, and not to Thomas Turner, from Tracy in conversation (Rec., p. 47), but Tracy never told him of what Silas Turner's estate consisted (Rec., p. 53).

In April, 1891, Erle had a "settlement" with his father, by which his father gave him a check on the Second National Bank of this city, and a note, amounting together to $1725, being Erle's share of the harvest of the Texas farm, under their agreement. He did not know where his father got

that money, as " it was of no importance to him " (Rec., pp. 54–55).

On cross-examination Erle admits that his first knowledge that he and his brother and sisters were beneficiaries under Silas Turner's will was obtained from Tracy in Washington, in the spring of 1891, " later than April."

He did not ask him how large the estate was or what it consisted of (Rec., p. 63).

His father had *concealed* the fact that the children had any interest in it (Rec., p. 63).

Erle thinks Tracy told him he had the estate invested in real estate (Rec., p. 63), but he did not know how much it was, or what it consisted of, and never inquired.

After 1891, when Erle says he got his information as to the nature of Silas Turner's will and estate, he wrote to his father about it, but does not know what he said, nor what his father replied, *but he never asked his father for any accounting, nor did he communicate his knowledge to his brother and sisters* (Rec., pp. 64, 66, 67, 85, 92, *et passim*); and this although on two distinct occasions he visited his father—once in Virginia and once in Texas—and spent at least two weeks with him each time (Rec., pp. 72, 73).

Defendants offer in evidence several letters from Erle to Tracy, most of which are concerned with Erle's troubles with a woman in Philadelphia, and with the money in Tracy's hands belonging to Silas Turner's estate. See Exhibits E. H. T., Cross-Ex., Nos. 11 to 15, inclusive (Rec., pp. 213–219).

To only one of these letters do we wish to call the court's attention at this time, in which Erle says:

" About the property. I wish you would just let it rest as it is for the present. Now about letting the others have it. I think they have all had more than I have and are getting the use of it now.

" When papa made an assignment he put all the property

in Wilmer, Lunette, and Ashby's name. Did not mention me not even for the $1,300 that I had loaned him. I have his order for this amount in your hands. This is all I will ever get, as I would not make any fuss about the Vernon property, so you see I much prefer you keep the property just as it is. You are safe in what I receipt for, and I think it no more than right that I should have this, as they have all the rest and are having the benefit of it now—at any rate, do not take any step for the present." (Rec., pp. 213-214.)

This letter is undated, but by reference of the blowing up of the Maine contained in it, and by the postmark on the envelope, it is fixed at February, 1898.

The assignment referred to was a transfer of all of Thomas Turner's property, real and personal, to the three children mentioned, by a warranty deed and a bill of sale dated September 4, 1894. Each deed recites the receipt of trust funds by Thomas Turner for the benefit of his children, Exhibit T. M. T. Nos. 21 and 22 (Rec., pp. 239-241). Turner says, however, that the purpose of these deeds was merely to defraud his creditors (Rec., p. 130), and the complainants show that they never had any benefit from the property conveyed to them.

We wish to refer now for a moment to the testimony of Thomas M. Turner merely to show how he played his part in the scheme invented and made the basis of the bill to make it appear that the complainants were kept in ignorance of all facts relating to S. H. Turner's will and his estate until after Tracy's death—and how he failed in his part.

On direct and on cross-examination he states very distinctly that he never told his wife, his children, or his relatives in Virginia that S. H. Turner had left any money at all to him or to any one else; that he *concealed* all facts pertaining to S. H. Turner's estate from *every one* except Tracy.

He did not give his brother's relatives in Virginia any information about his brother's estate (Rec., p. 115).

He did not inform his wife (Rec., pp. 119, 137, 160).

He never informed any of his children (Rec., pp. 124, 126, 160), until he wrote a letter to his daughter Wilmer in 1899, after Tracy's death.

As to these facts, his testimony is completely overborne by that of defendant's, by which it is established by the clearest evidence of disinterested witnesses, not only that Turner did *not* conceal the facts relating to Silas Turner's will, but *that he read his will aloud in the presence of Justin E. Sowers, Robert S. Rust, and one Kerfoot, and all facts pertaining to said will and estate were perfectly well known to all of Turner's relatives in Virginia and to the Turner children*, the complainants, who lived with the Rusts and Sowers in Virginia for some time on several occasions, and these facts were never kept secret from anybody.

Testimony of Robert S. Rust, Rec., pp. 302, 306.
Testimony of Justin E. Sowers, Rec., pp. 315, 319.
Testimony of Mary M. Rust, Rec., p. 327.
Testimony of Mary A. Sowers, Rec., p. 339.
Testimony of Mazie Rust, Rec., pp. 340–342.
Testimony of Ella C. Rust, Rec., pp. 346–347.

The testimony of Wilmer Turner taken, as it was, on different days is very contradictory as to when she first obtained knowledge of Silas Turner's estate being left to her and her brothers and sister.

On direct examination she states she first learned of the disposition of Silas Turner's property from her mother, not earlier than the summer of 1893, in Alderson, West Virginia, or in 1895, in Vernon, Texas (Rec., pp. 41–42).

And the first and only time she had any conversation with her father about the matter was in September, 1896, in Vernon, Texas, when he told her "Tracy had not acted right and there had been some substitution of notes" (Rec., p. 42).

On cross-examination she states she does not know when she first learned that S. H. Turner had left any property,

prior to hearing of it from her brother, Erle, just before suit was filed (Rec., p. 187).

Although she learned, just before the suit was filed, that her father had gotten a large part of Silas Turner's estate, and with the proceeds had bought the Vernon property, and had sold it, and had in his possession at the very time the suit was brought a large part of the proceeds of the sale, she never asked him for any accounting of the moneys received by him or for the return of any part thereof, nor did she ever make any complaint of his actions, nor find fault therewith.

2. *Principles of law applicable to these facts.*

While, of course, the defense of laches must always rest principally upon the peculiar facts of each case, and, as often said by the courts, no case of laches can form a precedent for another, yet there are certain well-defined equitable principles which must be applied in all cases to test the right of the complainants to ask relief of a court of equity.

And first we wish to note the well-recognized distinction between laches and acquiescence.

The following use of the words by Story brings out the difference. He refers to :

"Gross *laches* in the prosecution of rights, or long and unreasonable *acquiescence* in the assertion of adverse rights."

2 Story, Eq. Jurisp. (13th ed.), sec. 1520.
Hall *vs.* Otterson, 52 N. J. Eq., 522.
De Bussche *vs.* Alt, 8 Ch. D., 286.

Again, Lord Cottenham, in Leeds *vs.* Amherst (2 Phillips, 123), says, defining *acquiescence:*

"If a party having a right stands by and sees another dealing with the property in a manner inconsistent with that right, and makes no objection, while the right is in progress, he cannot afterwards complain."

And the mere assertion of a claim, unaccompanied with any act to give effect to the asserted right, cannot avail to keep alive that right; there must be some effective legal demand made.

Lane and Bodley Co. *vs.* Locke, 150 U. S., 193.
Mackall *vs.* Casilear, 137 U. S., 556.

In addition to this doctrine of acquiescence, which in some cases amounts to estoppel, we submit the following principles applicable to and controlling this case:

1. Mere lapse of time alone does not constitute laches; but the matter is one to be determined by the court, exercising a discretion governed by fixed principles.

2. Among those principles is the rule that where, through unexplained lapse of time (whether long or short), *the original transactions have become obscured by loss of evidence, death of parties or witnesses, or the loss of documents, equity will refuse relief.*

Aylward *vs.* Kearney, 2 Ball and B., 403.

3. Also that the duty to act and to enforce rights arises, not only upon the ascertainment of those rights, or upon the ascertainment of a fraud, but *upon the ascertainment of facts which will put the party upon an inquiry.*

These principles have been forcibly expressed and applied in the following cases:

Speidal *vs.* Henrici, 120 U. S., 377.
Hammond *vs.* Hopkins, 143 U. S., 224.
Dade *vs.* Irwin, 2 How., 383.
Foster *vs.* Mansfield, &c., Ry., 146 U. S., 88.
Halstead *vs.* Grinnan, 152 U. S., 412, 416.
Brown *vs.* County of Buena Vista, 95 U. S., 157.
Penn. Mutual L. I. Co. *vs.* Austin, 168 U. S., 685.
Elmendorf *vs.* Taylor, 10 Wheat., 152.
Beckford *vs.* Wade, 17 Ves., 97.
See, also, Wood on Limitations (3d ed.), 486.

In *Foster vs. Mansfield, &c., Ry.* (*supra*), the court, by Mr. Justice Brown, said (p. 99):

"The defence of want of knowledge on the part of one charged with laches is one so easily made, easy to prove by his own oath, and hard to disprove; and hence the tendency of courts in recent years has been to hold the plaintiff to a rigid compliance with the law, which demands, not only that he should have been ignorant of the fraud, but that he should have used reasonable diligence to have informed himself of all the facts."

In that case a delay by a stockholder of ten years in filing a bill in equity to set aside an alleged fraudulent sale of the property of the corporation was held to be such a delay as barred him from his right to relief.

In *Brown vs. County of Buena Vista* (*supra*), Mr. Justice Swayne says, quoting:

"Nothing can call forth a court of equity into activity but conscience, good faith, and reasonable diligence. Where these are wanting, the court is passive and does nothing. Laches and neglect are always discountenanced, and, therefore, from the beginning of this jurisdiction there was always a limitation of suits in this court."

He then says, in language peculiarly applicable to this case:

"The law of laches, like the principle of the limitation of action, was dictated by experience, and is founded in a salutary policy. The lapse of time carries with it the memory and life of witnesses, the muniments of evidence and other means of proof. The rule which gives it the effect prescribed is necessary to the peace, repose, and welfare of society. A departure from it would open an inlet to the evils intended to be excluded" (pp. 160–161).

In *Beckford vs. Wade* (*supra*) Sir W. Grant, while conceding that lapse of time constitutes no bar to the enforcement of an express trust, points out in clear language the effect of

laches and acquiescence upon the enforcement of a constructive trust. He says:

"'It is certainly true that no time bars a *direct trust;* but if it is meant to be asserted that a court of equity allows a man to make out a case of *constructive trust* at any distance of time after the facts and circumstances happened out of which it arises, I am not aware that there is any ground for a doctrine so fatal to the security of property as that would be: so far from it, that not only in circumstances where the length of time would render it extremely difficult to ascertain the true state of the fact, but, *where the true state of the fact is easily ascertained, and where it is perfectly clear that relief would originally have been given upon the ground of constructive trust, it is refused to the party who, after long acquiescence, comes into a court of equity to seek that relief*'" (p. 1160).

See also *Penn Mutual Ins. Co. vs. Austin* (*supra*), where the authorities on this point are elaborately reviewed.

3. Summarizing the facts above set forth, it will be seen that the cases presented are, as to the complainants Erle and Wilmer Turner, distinctly cases for the application of the principles of laches and acquiescence.

As to Wilmer.

(1.) She came of age on the 11th of October, 1896.

(2.) She knew both from her mother and from her father, as early as 1893 or 1895, that S. H. Turner's estate had been left to her and her sister and brothers, and that it had been turned over to her father.

(3.) After she came of age, with knowledge of these facts, she made no complaint to Tracy nor any inquiry of him as to her rights.

(4.) She knew at the time the suit was brought that her father had a considerable portion of the estate still left in his possession, yet she never made any complaint or objection to him, nor any demand or request for the return of her share of the fund.

By her acts she *acquiesced* in the payment by Tracy to her father as a payment to one qualified to receive the money for her, and by her delay in prosecuting her rights until after Tracy's death she forfeited her rights to the assistance of a court of equity.

As to Erle.

(1.) He came of age in 1890.

(2.) He knew directly after his uncle's death, by letter from his father to his mother, that his father had taken possession of the whole property of S. H. Turner.

(3.) He also knew that after 1888 his father, having no other means of support, spent large sums of money in buying and developing the farm in Texas and in supporting and educating his whole family.

(4.) Erle knew from Tracy in 1891 that he and his brother and sisters were entitled to the whole estate of Silas H. Turner, and that a large part of said estate had been turned over by Tracy to his father.

(5.) By his letter to Tracy of February, 1898 (Exhibit E. H. T., Cross-Ex. No. 11, Rec., p. 213), Erle showed that he knew of the payment of the money by Tracy to Thomas Turner, and this letter evidences acquiescence in this disposition of the property. Certainly no one would ever think, after reading this letter, that after Tracy's death Erle would bring his suit against Tracy's estate to recover the property handed over to Erle's father which Erle speaks of in this letter as having been assigned to his brother and sisters, and would allege in his bill that Tracy had retained the entire trust fund, and that he, Erle, had been ignorant of that fact until after Tracy's death.

In this state of the case, in view of Erle's *expressed acquiescence* in Tracy's payment of the bulk of the S. H. Turner estate to Thomas Turner, and in view of his *unexplained delay* of at least eight years, in view of his unexplained failure to

make inquiry after, in 1891, he had ascertained facts relating to the alleged breach of trust, in view of the death of Tracy during his delay, we submit that Erle ought, according to principles of equity and good conscience, be refused relief at the hands of a court of equity.

He ought not to be permitted to take advantage of his own negligence and delay at the cost of one whose mouth is closed by death. To allow him to do so would be to aid him in the perpetration of a fraud.

Brief on Assignment of Errors on Decree of June 8, 1904.

Without abandoning any of the assignments of error on the decree of June 8, 1904, ratifying and confirming the auditor's report and decreeing certain sums due to the complainants, we will reduce the errors assigned to three points, viz:

(1.) The estate of Philip A. Tracy was not primarily liable to the complainants in the sum of $30,051.03, but if the decree of the 10th of October, 1902, was proper, said estate is liable only in the sum of $27,249.04.

This proposition is embodied in the 4th, 5th, 6th, 7th, and 8th assignments of error.

(2.) Tracy's estate is not chargeable with interest, as found by the auditor and decreed by the court below.

This proposition is embodied in the 10th and 11th assignments of error.

(3.) Tracy's estate is entitled to credit for the payment made by Thomas M. Turner to Erle H. Turner on the 10th day of April, 1891, amounting to $1,200.

This proposition is embodied in the 12th and 13th assignments of error.

We will consider these points in their order.

I.

The estate of Philip A. Tracy was not primarily liable to the complainants in the sum of $30,051.03, but if the decree of the 10th of October, 1902, was proper, said estate is liable only in the sum of $27,249.04.

The first duty of the auditor, as prescribed by the decree of the 10th of October, 1902, was to ascertain the amount for which Tracy's estate was chargeable. The court having held that Tracy was trustee for the complainants in respect of all the property in the estate of S. H. Turner being or coming into the hands of said Tracy at and after the death of said Silas Turner, the primary liability of Tracy was, of course, the amount of said property and estate.

The complainants contended and the auditor found that the list of notes given by Tracy to Turner March 12, 1888, (Exhibit Erle H. Turner No. 22, Rec., p. 211) constituted the determining basis of Tracy's liability. According to this the sum with which Tracy was chargeable was $30,051.03.

The auditor found this contention sound and the court ratified his finding.

The defendants deny that the list of notes (Exhibit Erle H. Turner No. 22) could be used as proof of the amount of money in Tracy's hands at the time of the death of S. H. Turner, and they contend that said amount must be fixed by the list of notes given by Thomas Turner to Tracy and signed by Turner as being received "in full under the will of S. H. Turner, deceased," amounting to $27,249.04.

The history of these two lists of notes and the purpose of each has been detailed above and it is unnecessary again to state the circumstances in relation thereto. It is enough to say at this time that the Exhibit Erle H. Turner No. 22

was found by Thomas Turner among the possessions of Silas Turner shortly after his death; that Thomas Turner brought said list to Washington and confronted Tracy with it, and that Tracy admitted that he had the notes described in the list in his possession and that they were "as good as gold."

The list of notes or receipt given by Thomas Turner to Tracy (Exhibit T. M. T. No. 2, Rec., p. 221) was the receipt given by Thomas Turner to Tracy and admittedly represents the cash and notes delivered to Tracy by Turner, except the Maryland Avenue lots. (For the details and testimony of these two important pieces of evidence see above, page —.)

The point we now insist upon is that the amount of the fund with which Tracy's estate is chargeable was not the amount of the first list of notes (Exhibit E. H. T. No. 22), but the amount of the receipt list (Exhibit T. M. T. No. 2), or the amount of the notes deposited in bank plus the cash payments to Thomas Turner and the small amount that Tracy, according to his admissions, retained in trust.

1. *As to accuracy of Exhibit E. H. T. No. 22 as determining the amount of the fund.*

Counsel for complainants fix the date of this list as of March 12, 1888, the date of the last note contained in it. Accepting this date, it is to be noted that it was made at least six months before the death of Silas Turner. It does not, therefore, on its face seem to be a correct statement of the amount of money belonging to Turner in Tracy's hands at the time of the death of Turner; and that it actually was not such a statement is borne out by the admitted fact that some of the notes contained on this list—the Isdell note for $1,335.20 and the Lewis notes, amounting to $1,200—had been paid (Rec., p. 358). It may be, of course, that the proceeds of these notes were still in Tracy's hands; but clearly it is incumbent upon the complainants to establish as a fact that this money was in Tracy's hands at the time

of S. H. Turner's death. This duty is not discharged by the mere production of a list of notes found in S. H. Turner's possession dated six months before his death.

It is contended by complainants, however, that at their first interview after the death of Turner, Tracy admitted to Thomas Turner that he had in his possession all the notes contained in this list, and that they were "as good as gold."

Now Turner stated, in regard to this interview, that Tracy did not, at the time he made this alleged admission, carefully examine the list and identify the notes, but merely glanced at it, handed it back to Thomas Turner, said that he had those notes, and then they began to talk of the death of Silas Turner (Rec., p. 158).

As we have seen, Tracy did not have all those notes; some of them had been paid. It is clear, therefore, that by this admission Tracy admitted nothing more than that he had in his possession certain notes or other moneys belonging to Silas Turner. It is impossible to believe that Tracy intended to admit that he had each note set forth in the list, Exhibit E. H. T. No. 22.

2. *As to the list, Exhibit T. M. T. No. 2, as determining the amount of the fund.*

The paper which Thomas M. Turner signed recited:

"Received the above-described notes and cash *in full* under the will of S. H. Turner, deceased. T. M. Turner, natural tutor and agent for my minor children."

While a receipt of this nature may, of course, be explained or even contradicted, it is, nevertheless, *prima facie* true. The presumption arising from this paper is, therefore, that all the money that Tracy had in his possession belonging to the estate of S. H. Turner was contained in this list.

Turner, however, attempts to show, by his testimony, that

Tracy admittedly withheld about $6,000 of the fund and threatened him with a greater loss should he not consent.

We contend that Turner's testimony on this point is not credible, and that the payment to him by Tracy was not made by the wish of Tracy, but because of the earnest solicitation of Turner and because of his false and fraudulent misrepresentations, as we have shown above.

Knowing, as we do, that with the exception of the small amount held by Tracy, invested in the Maryland Avenue lots, he turned over all of Silas Turner's estate in his hands to Thomas Turner, and that this estate was represented by the list of notes (Exhibit T. M. T. No. 2), to reject this list of notes and to accept the list (Exhibit Erle H. Turner No. 22) would be to reject a certainty for an uncertainty. It is, we submit, a palpable injustice to charge Tracy with the amount represented by the list of notes (Exhibit Erle H. Turner No. 22) without further proof that the amount stated therein was actually in Tracy's hands at the time of S. H. Turner's death.

The amount of the fund with which Tracy's estate is chargeable is, if he be held a trustee for all the complainants, according to the Exhibit T. M. T. No. 2, $27,249.04.

II.

Tracy's estate is not chargeable with interest as found by the auditor and decreed by the court below.

The basis of this contention is that even admitting Tracy to have been a trustee, as found by the decree of the court below, yet in paying the bulk of S. H. Turner's estate to Thomas Turner, father of the complainants, he acted in good faith, believing Turner to be lawfully entitled to receive the money as "natural tutor and guardian of his minor children." If he made a mistake in making this payment it was an honest mistake.

We have detailed above the circumstances surrounding the payment by Tracy to Thomas Turner of the bulk of S. H. Turner's estate, and have attempted to show that the irresistible conclusion from the evidence is that Thomas Turner procured this payment from Tracy by his false and fraudulent representations, and that Tracy made the payment in good faith, believing that Thomas Turner was legally entitled to receive the money, and that the payment was for the benefit of the children of Thomas Turner. The evidence also shows that the complainants actually had the benefit of the money of the estate.

Assuming that this was the case, the estate of Tracy is not chargeable with interest on the money mistakenly paid over. (See 1 Lewin on Trustees, 349 (star page); Saltmarsh *vs.* Barrett (No. 2), 31 Beav., 349.)

III.

Tracy's estate is entitled to credit for the payment made by Thomas M. Turner to Erle H. Turner on the 10th day of April, 1891, amounting to $1,200.

Thomas Turner's account with the Second National Bank of Washington, D. C., shows that on April 10, 1891, he gave a check to E. H. Turner (Erle Turner) for the sum of $1,200 (Rec., p. 245). Thomas Turner also testifies that he gave Erle at the same time two notes—one for $200, and one for $325 (Rec., p. 123). Both father and son testified that this payment was made in Washington in April, 1891, Erle having come from Philadelphia and Thomas Turner having journeyed all the way from Texas for the sole purpose of reaching this "settlement" (Rec., pp. 53, 62, 63, 69, 70, 123, 169).

The payment of this large sum of money out of the S. H. Turner estate to one of the beneficiaries under the will of

S. H. Turner by Thomas Turner, into whose hands the bulk of said estate had come, naturally gives rise to the supposition that the payment was made for the purpose of satisfying, in part at least, the claims of the said beneficiary.

Erle Turner had no idea on the filing of this suit of allowing Tracy's estate credit in the amount received by him. Tracy, the only person in the world, as Erle supposed, who had knowledge of the transaction, except his father, was dead and could tell no tales. Erle and his father, therefore, in order satisfactorily to account for this payment and to show that it was not in satisfaction of Erle's claims against S. H. Turner's estate, both testified, as we have seen, that Erle was ignorant of the nature and extent of his rights to a share in the Turner estate.

The complainants' theory as to Erle's supposed ignorance has been completely exploded and it is not necessary to comment again upon it.

What, then, is the complainants' explanation of this payment of $1,725 to Erle?

Both Erle and his father testified that Erle worked for his father on the Vernon farm under "an arrangement" by which Erle was to get a certain share of the proceeds of the crops. After almost two years of this work, without any statement of income or expenditures, they had this settlement in Washington, by which Thomas Turner paid to his son Erle $1,725, including about $200 which Thomas Turner had in his possession belonging to Erle, saved for him since his boyhood.

It is to be noticed that, as the auditor found (Rec. No. 1460, pp. 7, 8), the wheat crop for 1891 had not been harvested at the time Thomas Turner paid to Erle one-half of his supposed profits out of his wheat crops. The auditor says in his report:

"Under all the conditions surrounding this rather singular transaction, specially as to the estimate of proceeds of a crop not harvested at the time of settlement and in the absence

of more definite information as to the character of negotiability of these notes which Thomas Turner, father of Erle, expressly knew were the property of his children, I am of the opinion that Erle should be charged with the sum of the two notes."

We are at a loss to understand on what grounds the auditor allowed $525 of this claim for credit and rejected the claim as to $1,200.

The propriety of the claim does not depend upon the negotiability of the notes only, but upon the fact that they were specifically a part of the S. H. Turner estate. If the claim is allowed in part it should be allowed in whole, for, as we earnestly contend, Erle had full and complete knowledge of his share in the S. H. Turner estate at the time he received this money, and the presumption that he received it in satisfaction of his claim is not rebutted by the incredible story as to the money being paid him for his share of the profits from crops that had not been harvested. It is submitted, therefore, that the Tracy estate, in the accounting before the auditor, should have been allowed credit in the sum of $1,725 as against the complainant Erle Turner.

Conclusions.

The decree of the court below, entered on the 10th of October, 1902, should be reversed, because—

(1.) The evidence adduced by the complainants does not support, but disproves, the allegations of the bill of complaint.

(2.) The court erroneously held and decreed Philip A. Tracy to be a trustee for Silas H. Turner as to the funds in Tracy's hands belonging to Turner at and before Turner's death, and that after his death he became trustee as to said funds for the complainants, the children of Thomas M. Turner.

(3.) The estate of Philip A. Tracy is not liable to the complainants as to the fund paid over on November 30, 1888, by Tracy to Thomas M. Turner as natural tutor and guardian for his minor children, said payment having been made in good faith and at the request and by reason of the representations of Turner, and having been a complete and valid discharge to Tracy against subsequent demands made on him by complainants.

(4.) The complainants, Erle Turner and Wilmer Turner, are barred from the relief prayed by their acquiescence in the alleged breach of trust on the part of appellants' decedent and by their laches in prosecuting their claim.

The decree of the court below, entered on the 8th of June, 1904, should be reversed because the auditor erroneously found and the court ratified and confirmed said finding:

(1.) That the estate of Philip A. Tracy was primarily liable to the complainants in the sum of $30,051.03, instead of the sum of $27,249.04.

(2.) That Tracy's estate is chargeable with interest.

(3.) That Tracy's estate is not entitled to credit for the payment made by Thomas M. Turner to Erle H. Turner on the 10th day of April, 1891, amounting to $1,200.

It is respectfully submitted, therefore, that the decrees of the court below be *reversed* with costs.

NATH'L WILSON,
CLARENCE R. WILSON,
Solicitors for Appellants.

Court of Appeals, District of Columbia.

OCTOBER TERM, 1904.

No. 1266 and No. 1460.

JOSEPH J. DARLINGTON AND GEORGE W. GRAY EXECUTORS OF PHILIP A. TRACY, DECEASED, APPELLANTS,

vs.

ERLE H. TURNER, WILMER TURNER, ASHBY TURNER, AND LUNETTE TURNER, BY WILMER TURNER, NEXT FRIEND, APPELLEES.

SUPPLEMENTAL AND REPLY BRIEF ON BEHALF OF APPELLANTS.

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SUPPLEMENTAL AND REPLY BRIEF ON BEHALF OF APPELLANTS.

If the court upon consideration shall find and hold, contrary to the contentions made in our first brief, that the variance between the averments of the bill and the proofs is not material, and that the payment and transfer made by Tracy to Thomas Turner was not a good payment, and that the executors of Tracy are accountable for the fund that came into Tracy's possession, there will still remain to be determined by the court what the precise amount of the fund really was, and whether the complainants are entitled to

recover interest thereon, and whether the complainants or any of them are barred from recovery by acquiescence, delay, or laches.

Upon these questions we wish to make further comment and to reply to some of the positions taken in the brief for the appellees.

I.

The averment in the bill that at the time of the death of Silas Turner, in 1888, Tracy had in his possession a trust fund or estate belonging to Silas Turner, consisting of the notes described in the list set out in the seventh paragraph of the bill, amounting to $28,972.10, is not supported by the evidence.

The list of notes referred to in the seventh paragraph and in other paragraphs of the bill is the list which appears in the record as *Exhibit Erle H. Turner No. 22* (R., 211), and will be hereinafter designated as Exhibit 22.

It is made by the auditor the basis of the account against the executors, and is said to constitute the "primary liability" of Tracy's estate (R. in 1460, pp. 5 and 6).

In the argument for the appellees this "list" is relied on not only to prove the existence and amount of the trust fund, but it is made the corner-stone of the claim that Tracy *fraudulently* and *corruptly* turned over the greater part of the trust fund therein described to Thomas Turner in order that he, Tracy, might keep for his own benefit $6,000 of the fund, and the further claim that Tracy's "greed and fraud" constitute the explanation of his conduct in the disposition he made of Silas Turner's property, scheduled in the paper.

The appellees' brief contains the following statement concerning this important document, the italics being ours:

"The only estate or property of any kind found in "Silas H. Turner's possession in Virginia, besides his "simple wearing apparel, was his watch and fifteen "or twenty dollars in money (Rec., pp. 155–'6), *and a* "*list of notes*, giving their dates, name of maker, and "amounts (Exhibit Erle H. Turner No. 22, Rec., pp. "106, 211). *All of this paper* is in the handwriting "of Philip A. Tracy, except the lead-pencil footings "of the columns and the words 'am't for'd,' and the "memorandum at the bottom, 'This list was given "by Mr. Tracy as a list of the property of S. H. Turner "in his hands,' the former being in the handwriting "of Thomas M. Turner and the latter being in the "handwriting of Erle H. Turner (Rec., pp. 107, "288).

"*This list is headed 'S. H. Turner'* and the principal "of the notes *there enumerated* aggregated $28,972.10 "(Rec., p. 211)."

An inspection of the original of Exhibit 22 will, we think, convince the court that it has no evidential value or importance whatsoever and is entitled to no weight or consideration as evidence against Tracy's executors.

1. It will be seen that it is not "a paper," but *two* papers pinned together. It is not *a* list of notes, but *two* lists of notes, on separate pieces of paper which were originally parts of two sheets of foolscap. Each sheet is incomplete and mutilated. The lower part or quarter of each sheet is missing. On the lower edge of the first sheet parts of letters or figures appear which must have been continued on the parts of the page or sheets that are missing.

The pieces that compose the mutilated and imperfect pages that constitute the exhibit were *pasted together by Thomas Turner* (R., 107 and 52).

The last date that appears on the last sheet of the exhibit is March 12, 1888. After that Silas Turner came to Washington and made his will at the office of Tracy on the 30th of April, 1888 (R., 266).

What money, securities, or papers Silas took back with him to Virginia we have no means of knowing.

He was taken ill in the following July or August. Thomas arrived from Texas on the 11th of August, and remained with his brother until he died, on the 20th of September, 1888 (R., 106).

Thomas had access to his brother's property while he was alive, and took entire control of his effects after he was dead.

He testifies that the only evidence that he found of the ownership of *any* property was the *list*, and that except the list of notes and the will he did not find any trace of any account or of any list or of any letters from Tracy—" nothing in the world bearing on the case " (R., 136).

When the document so found by Thomas Turner is produced in evidence by the complainants its appearance and condition are certainly such as to excite suspicion. The loss or removal of portions of the two sheets has apparently so changed and altered it as to destroy its completeness and to make it something different from what it originally was.

Under these circumstances the same rules or principles of evidence are to be applied to the paper, Exhibit 22, that are held to be applicable to all altered or mutilated instruments when offered in evidence.

If on the production of a written instrument it appears to have been altered, it is incumbent on the party offering it in evidence to explain this appearance.

Every alteration on the face of a written instrument detracts from its credit and renders it suspicious, and this suspicion the party claiming under it is ordinarily held bound to remove.

Greenleaf on Ev., 15th ed., vol. 1, sec 564.

> " Where the alteration appears to be suspicious on its face, and is not duly noted, *as if the paper have been cut close or a mutilated figure be left*, or the ink differ etc., the onus *lies with the party who claims that the*

alteration was genuine" (Phillips on Ev., 4th ed., vol. 1, p. 606, note).

The possession of this mutilated and imperfect paper by Erle Turner and his father, the writing thereon in pencil by both, the rearrangement and pasting of its parts by the father, the use that is sought to be made of it in the interest of the complainants, will illustrate the necessity for and the advantages of the rule of evidence that has been referred to.

Erle Turner, one of the complainants, the witness who produced the paper in evidence, and Thomas Turner, into whose possession the paper first came on the death of Silas, offer no explanation of the mutilations and alterations, which are of a serious character and even suggestive of fraud.

In the absence of any explanations the paper is unworthy of judicial credit and cannot be used in its corrupted state for the advantage of the complainants. When a written instrument is shown to have been altered or defaced, it may properly be inferred that this was done in the interest of the party to be benefited by the spoliation. When that inference is not overcome by exculpatory proof, the instrument ceases to exist as a muniment or evidence of title or of right in the party who seeks to derive advantage therefrom.

2 Wharton on Evidence, 2d ed., sec. 1264.

In *Babb vs. Clemson*, 10 Sarg. & R. (Pa.), 419, Duncan, J., said:

> "All written contracts, whether by deed or not, are intended to be standing evidence against the parties entering into them, and so much of the business of the world depends on this kind of evidence, that it should be fortified by every legal sanction, and therefore, it is, *that all instruments, altered in a material part, are thereby avoided.* There is a most beneficial effect resulting from this, that persons having the custody of these will not alter them, for fear of losing their security, and the reason applies as well to instruments intended as standing evidences of a contract, as in-

> struments which are depended on as the sole security; and the true reason is, that it would be extremely dangerous to permit the party to recover by the medium of written evidence, as it originally stood, after an attempt to commit a fraud, by covering property from execution not included in the written contract. The policy of the law is that a man shall not take the chance of committing a fraud and when a fraud is detected, use the instrument as if he never had altered it; in that case, the law intervenes and avoids the falsified instrument or writing. If it avoids it, it does not do so partially, but for every legal purpose, and in reason, there can be no difference, whether it be made use of as an instrument of title, or evidence of it; both are within the same reason, and ought to be within the same law."

It appears from these authorities and many others that might be cited that it is well settled that if a paper be produced at a trial, the identity of which is made doubtful by its appearance, and which has evidently been mutilated or altered, the party producing it must satisfactorily explain its changed condition and the alterations that have been made, and that if he fails to do so the paper cannot be used in evidence in his favor for his advantage.

2. If the paper, Exhibit 22, when it was found by Thomas Turner was in the same condition that it is now except the marks and words in pencil, it certainly bore on its face no evidence or indication that it was or was intended to be a complete schedule of the property of Silas Turner in the possession of Tracy at any particular time. It was not until 1898, shortly before the bill was filed, that Erle Turner wrote thereon in pencil that the list was given by Tracy as a list of the property of S. H. Turney in Tracy's hands.

But if it was a complete and authenticated document, it would not itself constitute or be the basis of any obligation or liability.

The only value and importance that it has, all the character, power, and effect that are claimed for it by the appellees, as an account stated and admitted, are conferred by and depend upon the testimony of Thomas Turner himself, who says that shortly after the death of his brother he called on Tracy with his attorney, Mr. Hunton, and showed the paper to Tracy, who admitted that the list was correct, that he had the notes, and that they were good (R., 158).

It is wholly *improbable* that Tracy made the statement attributed to him *concerning the paper, Exhibit 22.* As we have already shown, it is exceedingly doubtful and uncertain what list or paper Thomas Turner then had in his possession and what he showed Tracy.

Was it the first sheet or the second sheet of Exhibit 22, or both sheets pinned together?

Were the parts now absent then in their proper places?

We know as a matter of fact that *all* the notes described in what appears in the record as Exhibit 22 were not in the possession of Tracy, as Tracy well knew.

The notes of Caroline Isdel, amounting to $1,325.50, and the notes of Mary Lewis, amounting to $1,200, had been paid and canceled and the deeds of trust given to secure them had been released (R., 358).

Furthermore, if Tracy *did* make the admissions and statements testified to by Thomas Turner, and made them in the presence of Mr. Hunton, a highly respectable lawyer of Virginia, it seems improbable that the complainants would have abstained from calling or tendering him as a witness.

Independently of the inherent improbabilities of the truth of Thomas Turner's statement as to Tracy's *admissions* when Exhibit 22 was shown to him, Thomas Turner, the only witness produced to prove that such a statement was made, is unworthy of credit.

(*a.*) His credibility is impeached by his confessions of the concealments from and misrepresentations to his wife and children in respect of his children's property, and by the use which he seeks to have made of his alleged concealments and misrepresentations in order to obtain from the defendants the value of the property which he himself received from Tracy, and a portion of which he still holds.

(*b.*) He is impeached by his co-operation in the plan obviously formed by Erle after Tracy's death to avoid the consequences of his own conduct, and to excuse and justify his long neglect and failure to hold Tracy to accountability for his alleged misconduct of which he knew.

(*c.*) He is impeached by his deliberate and false statement that he did not give any information about the will of his brother to any of his brother's relatives in Virginia before returning to Louisiana, when the fact, fully established by the testimony, is that the day after the burial of Silas he, Thomas, himself read the will aloud in the presence of three witnesses, two of whom testified to that occurrence and one of whom is dead (R., 302–315).

This pretended concealment of the contents of the will was an important element in the plan of attack on Tracy's estate.

(*d.*) He is impeached by his conveyance of the Texas farm and personal property to his children, Wilmer, Ashby, and Lunette, for the purpose of keeping it from his creditors, by a deed reciting, as consideration, moneys paid by Tracy, "executor of the last will and testament of my deceased brother, S. H. Turner in trust for the use and benefit of my children, viz: Wilmer Turner, Ashby Turner and Lunette Turner" (R., 239 and 241), and by his procuring and permitting the property to be sold for taxes, and by buying it in from the State in his own name and for his own benefit after its forfeiture to the State.

(*e.*) He is impeached by his insensibility to moral obligations as shown in the instances above mentioned and by his claim that the proceeds of the sale of the Vernon property, which was originally purchased with the money of the estate of Silas Turner, belongs to him in his own right and not to his children (R., 143).

The false testimony given by Thomas Turner in respect of his concealment of the will of his brother is of itself sufficient to warrant the court in rejecting his testimony *in toto*.

In the case of the Santissima Trinidad, 7 Wheat., 283, Story, J., said:

> "But where the party speaks to a fact in respect to which he cannot be presumed liable to mistake, as in relation to the country of his birth, or his being in a vessel on a particular voyage, or living in a particular place, if the fact turn out otherwise, it is extremely difficult to exempt him from the charge of deliberate falsehood; and courts of justice, under such circumstances, are bound, upon principles of law, and morality and justice, to apply the maxim *falsus in uno falsus in omnibus*. What ground of judicial belief can there be left, when the party has shown such gross insensibility to the difference between right and wrong, between truth and falsehood?"

In the case of *Huber vs. Teuber*, 3 MacArthur, 484, Mr. Justice Wylie said:

> "But in respect to the credit of a witness before a jury, this materiality is not essential. A witness who is discovered on a trial to have sworn to a deliberate falsehood in relation to a matter the truth of which he must have known at the time of giving his testimony, although the fact may not be material, yet by that act exhibits such gross insensibility to the obligations of his oath, and to truth, and such shameless hardihood in vice, as leaves no ground for judicial belief to any part of his testimony."

It is therefore submitted that, in view of the foregoing considerations, the list of notes, Exhibit E. H. T. No. 22, cannot be taken or used as a basis of liability of Tracy's estate to the complainants.

If it should be held that Tracy's estate is liable for the fund in Tracy's possession at the time of Silas Turner's death, and that the payment to Thomas Turner was not a good payment, the basis of the liability of the estate of Tracy would be the notes and money described in the *receipt* of Thomas Turner given to Tracy, Exhibit T. M. T. No. 2 (R., 221), amounting to $25,979.39, and *not* the so-called "list of notes," Erle H. Turner Exhibit No. 22 (R., 211), amounting to $28,972.10.

II.

The complainants are not entitled to recover interest. The granting or withholding interest in cases like this rests in the discretion of the court. The allowance of interest would be inequitable in view of the facts disclosed by the record.

In the auditor's report which was confirmed by the court below, and in the brief for the appellees, the appellants' objections to the allowance of interest receive scanty notice and are summarily disposed of.

The auditor bases his conclusion on the opinion or finding of the court that Tracy had abandoned his trust and upon his own finding that there was no reasonable excuse for his action (R. 1460, p. 6).

In the brief for the appellees it is charged that Tracy's conduct in transferring the fund to Thomas Turner was not only wrongful but fraudulent, and it appears to be thought that for that reason the appellees are entitled to interest as a matter of course.

We suppose that it will not be claimed by the appellees that interest is recoverable by them as a matter of legal right, and that it will not be denied that, except when provided for by contract or by statute, interest is granted or denied by the courts of the United States in the exercise of their judgment and discretion and in view of all the facts and circumstances they are called upon to consider.

This appears to be well settled by the decisions of the Supreme Court (Redfield *vs.* Iron Co., 110 U. S., 374, and cases cited):

U. S. *vs.* Sanborn, 135 U. S., 281.
U. S. *vs.* North Carolina, 136 U. S., 216.
Spalding *vs.* Mason, 161 U. S., 375.
Glover *vs.* Patten, 165 U. S., 412.

In numerous cases decrees have been ordered to be entered without interest, and no reason given for the action of the court.

In the case of *Redfield vs. Ystalyfera Iron Co.* (110 U. S., 174, 176), the court said:

> "Interest is given on money demands as damages for delay in payment, being just compensation to the plaintiff for a default on the part of his debtor. Where it is reserved expressly in the contract, or is implied by the nature of the promise, it becomes part of the debt, and is recoverable as of right; but *where it is given as damages, it is often matter of discretion.*"

What, then, are the circumstances and considerations that should guide the court in the exercise of its judicial discretion in this matter of interest?

In the first place, it is an indubitable fact that Tracy never received a penny of interest or profit from the money or securities that he delivered to Thomas Turner on the 30th of November, 1888, except perhaps the $1,800 invested in the Maryland Avenue lots, as explained in our first brief.

In the second place, it is an indubitable fact that the complainants did derive benefit and advantage from that money. The auditor finds that "after the death of Silas Turner Thomas Turner had no means or income for the support of his family," which was composed of his wife and the complainants, "except that derived from the estate of Silas Turner, which was the property of his children."

He invested of the money received by him $7,550 in the purchase of a home in Vernon, Texas, and in the purchase of a farm near Vernon and in stock and machinery, etc.

"These investments," the auditor says, "furnished support for the family from the time they were made, and the only other source from which support was derived were funds of the same estate which Thomas Turner had drawn from the Washington bank and such personal service as he rendered in operating the farm" (R. 1460, p. 9).

What his children ate and what they wore, the roof that covered them, all the necessaries and comforts they had were bought with the securities obtained from Tracy, except perhaps some small earnings by Erle and Wilmer.

Thomas did, however, use of the fund, in obedience to the positive direction of his brother given to him just before his death, $1,500 in the purchase of a home for Mrs. Rust, the niece of Silas Turner, at whose house he died, and also $500 in paying the notes of another niece (R., 142).

The benefit actually received by the complainants from the estate in the hands of Thomas Turner, estimated and expressed in dollars and cents, was approximately, we allege, equal to the interest they would have received from their respective shares or interests if these shares had been separately invested so as to produce 6 per cent. interest per annum.

If it be admitted that the fund in Tracy's hands was $30,051.03, as claimed by the appellees, the share of each child would have been $7,512.75, and the interest thereon at 6 per cent. per annum would be $450.75, less than $1.25 per day.

But if there should be deducted from the fund the sum of $2,000, paid to Silas Turner's nieces by his direction to Thomas, and the sum of $1,800, invested in the Maryland Avenue lots and otherwise accounted for, the fund would be $26,251.03, and the share of each child would be $6,562.76. The interest on each such share at 6 per cent. per annum would be $393.76, not quite $1.10 a day.

We ask consideration of these figures, not with a view to fixing the amounts actually spent on the children, but to show in a general way what their respective shares would have produced, what would have been the utmost sum available for their support and benefit, and that the value of the benefits they received was measurably equal to the interest on the fund they would have received if their share had been invested.

Is it unreasonable to say in view of the facts disclosed by the record that the complainants have actually received already the full benefit of a fair rate of interest on the property their uncle left them, and are they now to be paid interest on that fund as though they had received nothing?

It is not to be forgotten in this connection that Thomas Turner testifies that Silas said to him after he had made his will and shortly before his death that *he had left his estate to his, Thomas', children and wanted him, Thomas, to manage it* (R., 143).

In the third place, it is undeniable that from the time that Tracy transferred the notes and money to Thomas Turner, in November, 1888, to the time of Tracy's death, in July, 1898, no complaint was ever uttered as to that transfer and no accounting was ever asked for, and we claim that the fact that it shows beyond question that Tracy received no profit from the trust fund transferred, and the fact of delay in making any complaint or bringing any action, precludes the complainants from recovering interest.

In the case of *U. S. vs. Sanborn, supra*, Sanborn had been

paid public money through a misunderstanding on the part of the Secretary of the Treasury, caused by a "misrepresentation" made to him by Sanborn.

In a suit brought by the United States to recover the money so paid, the Supreme Court said:

> "We are of opinion that the payment of the $7,334 to the defendant was due to a misapprehension, upon the part of the Secretary of the Treasury, as to the nature of his services—a misapprehension resulting from his representations to that officer—and that the amount so paid ought, in equity and good conscience, to be returned to the United States.
>
> "But we are of opinion that the court below erred in allowing interest for any time prior to the institution of this action. * * * We think that the same rule (disallowing interest) should be applied against the Government when, in a case like the present one, it has long delayed an assertion of its rights, without showing some reason or excuse for the delay, especially when it does not appear that the defendant has earned interest upon the money improperly received by him."

In the fourth place, and in reply to what appears to be suggested, but not plainly stated, in the appellees' brief, viz., that interest should be decreed on the fund that Tracy paid over to Thomas Turner, as well as upon that which Tracy retained, because the retention for his own benefit was illegal and corrupt and because his conduct after the death of Silas Turner was fraudulent, we say that the entire structure of Tracy's alleged cupidity, misconduct, and treachery, built up with such laborious subtlety in the brief for the appellees, rests, as we have shown, solely upon a discredited paper and a discredited witness.

The "list of notes" and the testimony of Thomas Turner being eliminated, as we think they must be, there is absolutely nothing in the record that proves, or tends to prove, that Tracy, in turning over Silas Turner's money to the

father of the complainants, did not act in entire good faith and in the honest, if mistaken, belief that the notes and money could properly be put into the custody of the *father*, who signed himself as the "natural tutor and agent of my minor children."

III.

The complainant Erle Turner is not entitled to recover of the appellees any part or proportion of the property transferred by Tracy to Thomas Turner in November, 1888, because of his acquiescence and laches.

In our first brief (p. 50 *et seq.*) we endeavor to show that the record conclusively proves that in April, 1891, Erle Turner was informed by Tracy that his uncle Silas had by his will left his property to the *children* of Thomas Turner and *not* to Thomas, and that Erle perfectly well knew that all the money that his father then had and all that he afterwards obtained belonged to the estate or was the proceeds of the property of the estate of Silas Turner, and also that Tracy had in his possession money of the estate; and we refer to certain well-settled principles of equity which define the duties and obligations which such knowledge and the state of facts then existing imposed upon Erle Turner in respect of the protection and enforcement of his rights, and we cite many cases in which the principles to which we refer have been applied.

We do not understand that the doctrine we have invoked is disputed, or that the authority of the cases we refer to is denied, but we are met by the argument in the brief for the appellees that the knowledge and information and the opportunities for obtaining information possessed by Erle Turner did not relate to and include the *material facts* upon which his rights and his duty to enforce them depend.

In the appellees' brief, under the heading in large and conspicuous print "THE DEATH OF TRACY LED TO THE DISCOVERY OF HIS LIABILITY, NEVER BEFORE KNOWN OR SUSPECTED" (R., 67), it is "admitted that in 1891 Tracy informed Erle that Silas had left the property to the children and Erle then supposed that the money which his father had been using came from that estate," but it is said neither Erle nor Wilmer saw the *text* of the will, and did not know that Tracy had possession of Silas' estate *in trust* for them, or that Tracy had any obligations of any sort in the matter beyond what remained in his hands, until after Tracy's death.

This, we remark, is contradictory to and inconsistent with the averments of the bill.

In paragraph 19 it is alleged that the complainants were "in entire ignorance of *all* facts relating to said trust estate from the time of said Silas H. Turner's death until about September, 1898, when the complainant Erle Turner accidentally learned of the death of said Tracy as hereinafter stated, and immediately engaged counsel to ascertain their rights" (R., 6).

In the same paragraph it is further alleged that the complainants were "induced to inactivity by the representations made by said Tracy, to their mother and the complainant Erle Turner that *the trust funds* were invested in lands or in notes which were during all said time unsalable and uncollectible," and were "lulled into security by the assurances made by said Tracy to the complainant Erle H. Turner, that he, Tracy, was doing the best possible for the interests of all these complainants, without once having denied the existence of the *trust estate* or their rights and his obligations in the premises with reference to *said trust estate*" (R., 7).

It is to be noticed that the bill was verified by the oath of Erle Turner, when he well knew all the facts that now appear in the record.

If we correctly apprehend the appellees' present contention, it is that although Erle knew his uncle Silas had made a will leaving his estate, not to his father, but to his father's children, he had never seen the *text* of the will and did not know that Tracy had been thereby appointed to distribute the property between them, and that although Erle knew that Tracy had in his possession money of the estate, he did not know before Tracy's death that Tracy had possession of Silas' estate *in trust* for the complainants, and that although Erle knew that his father had received money coming from his uncle's estate and belonging in part to him, he did not know that Tracy had *wrongfully* turned the money over to his father, or that Tracy had any obligations of any sort except in relation to the moneys remaining in his hands under a *trust* which he never repudiated.

It is also asserted that the record discloses no facts brought to the attention of either Erle or Wilmer which could reasonably have led them to suppose that Tracy had any "*legal responsibility*" for the possession of the fund by Thomas Turner or his wrongful use of it.

From these premises the argument appears to be drawn that as Erle was ignorant of the "text" and exact terms of the will and of what the estate consisted, and that Tracy was a trustee of the entire estate, until after Tracy's death, and was ignorant of Tracy's "*legal responsibility*," he was under no obligation to take any steps against Tracy until he was informed of these material facts and until he was advised by counsel what were his, Erle's, *legal* rights, and that as that knowledge and that evidence did not come to him until after Tracy's death, and there was nothing to put him on inquiring in the matter, Erle is not chargeable with laches in respect of his conduct during Tracy's lifetime before Tracy's death.

Before replying to this argument we call attention to the peculiar circumstances under which the material facts and

the "important papers" which revealed them were "*discovered.*"

The "important papers" were a copy of Tracy's will and the list of notes, Exhibit 22, hereinbefore referred to, which it is said had been "in Thomas Turner's possession all the time, locked up in a private repository, Thomas Turner keeping the key," and were produced by Erle Turner, to whom his father had sent them (R., 210).

The letter transmitting them to Erle is not produced, but two very full and interesting letters, addressed to Wilmer, one from her father, dated February 17, 1899 (R., 233), and one from her mother (R., 262), are in evidence, both evidently written with the knowledge that proceedings were contemplated against Tracy's estate.

At the end of his letter Thomas Turner says: "I send you a copy of the will. The original is on record in Warrenton, Fauquier Co., Va. All of my brother's papers were turned over to me" (R., 235).

Replying now to the argument that Erle was ignorant of material facts and of Tracy's "legal responsibilities" and of his own legal rights, we submit the following:

1. The will of Silas Turner was properly probated in Fauquier county, Virginia, and there admitted to record as required by the laws of Virginia (Code 1887, secs. 25–47).

This record afforded Erle constructive notice of the entire contents of his uncle's will and the bequest thereby made to him and of Tracy's obligations thereunder.

Pomeroy expresses the well-settled rule as to the effect of a record as constructive notice as follows:

> "When an instrument is one entitled to record, and has been duly executed and acknowledged or proved, and has been recorded in the proper manner and in the proper county,—then such record becomes constructive notice not only of the fact that the instrument exists, but of its contents, and of all the estates,

rights, titles, and interests, legal and equitable, created or conferred by it or arising from its provisions."

2 Pom. Eq. Jur., 2 ed., sec. 655, and cases cited.

2. Erle had actual notice and knowledge that his uncle had made a will bequeathing his estate to him and his brothers and sisters, and that Tracy had possession of a part of the estate, and that his father had received the greater part of the estate.

These undisputed facts were sufficient to impose upon Erle the duty of inquiring and ascertaining every other fact in regard to the will of Silas Turner, and the estate thereby bequeathed, and the connection of Tracy therewith, and the history and condition of the land, so far as the rights of Erle were therein involved.

The facts above mentioned were of such a character as to have suggested to any reasonable man the necessity, for the protection of his property and rights, of obtaining full information in respect of those matters of which he had only an *imperfect* knowledge, as he claims.

Neglect to obtain further and complete information necessary for the protection of his own interests, and inattention to his own property rights, would have been so inexcusable and so unnatural as to have amounted to and constituted gross negligence.

"Inexcusable negligence of and inattention to one's own interests" have been held to be laches.

Smith *vs.* Duncan, 10 N. Y., 4.

3. Erle Turner had every motive and full opportunity to ascertain with fullness and accuracy, not only the facts which he admits he knew, but also those which it is claimed he did not know.

(*a.*) He had full opportunity to see and easy access to the will of S. H. Turner, recorded in Fauquier county, and to know its full text and exact terms.

(*b.*) He had full opportunity during ten years, in Texas, Washington, and Virginia, to ask and insist on obtaining from his father full and exact information in respect of his uncle's estate and the disposition thereof.

(*c.*) He was a depositor in the Second National Bank in this city, in which bank his father had deposited the notes received from Tracy, two of which were deposited to Erle's credit.

(*d.*) He had every opportunity and motive to ask and insist on obtaining from Tracy a full and particular account of Tracy's dealings with Silas Turner, with the property of the estate, and with his father.

If, now, it is true, as claimed in appellees' brief, that Erle did not know the material facts, ignorance of which on his part is now asserted and relied on, it could only have been because he failed to make any effort to inspect the will or to make inquiry of his father or of Tracy.

In short, his alleged ignorance, due to his own negligence and gross stupidity (if his own testimony be true), is sought to be used as ground for application to a court of equity to protect him from his own negligence.

4. But we insist that the pretension that Erle did not know the contents of the will and the nature and the amount of his uncle's estate and the relation of his father and Tracy thereto is not supported by the testimony in the record and is not inconsistent with Erle's own testimony.

No one can read Erle's testimony and note his prevarications, his admissions of misstatements on his part and his suggestions of misstatements to be made by others, his affected inability to answer plain questions and to explain or even understand expressions and statements made by him in his own letters to Tracy, and entertain a doubt that he

knew a great deal more than he was willing to admit, and that he also knew what it was desirable for him to remember and what to forget in the interest of the suit in which he was testifying.

It is demonstrable from the record that he knew not only that his father had received from Tracy, in the fall of 1888, the greater part of his uncle's estate, but also just what his father had received.

He knew not only that Tracy had retained in his hands a small part of the estate, but he knew definitely what that small part was.

The record shows that from the time of his father's return to Louisiana in December, 1888, to April, 1891, when Erle went to Washington to meet his father and to have "a settlement," he being then over twenty-one years of age, he knew the particulars and details of his father's business in Louisiana and Texas, and had been in his father's service and had himself received and disbursed for his father considerable sums of money, amounting to over $4,000 (R., 145 *et seq.*), paid to him by his father's check on the Second National Bank, where the notes were placed and the proceeds of the notes as they were paid deposited to his father's credit.

At the time of the alleged settlement his father gave to him two of the very notes he had received from Tracy for $525 in payment of an alleged indebtedness due to Erle from his father.

At that very time, or shortly after, Erle was told by Tracy that his uncle had left his estate to his brother and sisters and himself (R., 63).

Some time *in the same year* Erle received from his father a copy of a certificate to serve as an order on Tracy for the payment to Erle of $2,500 (R., 84).

The certificate is as follows:

> "I hereby certify that I have invested three thousand six hundred dollars ($3,600,00) in ground on

Maryland avenue, between 9th and 10th streets, N. E., at thirty-five cents per square foot, and that Silas H. Turner is entitled to one-half of the proceeds derived from the sale of the same, after deducting the cost of the grading, sub-dividing and examining titles, etc.

"PHILIP A. TRACY."

(R., 222.)

It cannot be denied that before receiving this order there had come into Erle's possession and there had passed through his hands over $5,200 of the money of the estate.

What the fund actually was out of which these payments were made was well understood by Erle, and his father and his mother as well; and that there was no secrecy or concealment practiced concerning it by Tracy, is shown by his letter to Mrs. Turner, dated December 2, 1891, to which we ask attention. That letter is as follows:

"2/12/91.

"DEAR MRS. TURNER: The whole amount of money and notes turned over to Mr. Turner Nov. 30, '88, was $25,979.39. Of this amount $776.89 was in cash.

"The amount now due him in bank is $4,894.66.

"I have no way of finding out how many of the notes have been paid, but I am inclined to think very many of them have been paid.

"Yours truly, PHILIP A. TRACY."

(R., 230.)

It appears from the answer of Mrs. Turner to the questions sent to her by the complainants before this suit was instituted that in January or February, 1891, nearly a year before the above letter was written, Mrs. Turner had an interview with Tracy in Washington to ascertain "how the estate was being managed, how it was being turned over to my husband, or whether it had been turned over to him in any amount," etc., and she was informed then by Tracy that "what he had turned over to T. M. Turner had been with my husband's being appointed guardian for the children,"

and "he thought he had made a mistake in doing so, or words to that effect" (R., 264).

The letter of Tracy referred to and the interview between Tracy and Mrs. Turner destroy the pretense that any concealment in respect of the fund of the estate, or the disposition thereof, was ever thought of before the filing of this suit.

In the receipt signed by Thomas Turner for the money and notes delivered to him by Tracy appears the item "Md. Av. lots, $1800." The amount named was one-half of the sum invested by Tracy in lots on Maryland avenue. At the time the receipt was given these lots had not been sold.

Thomas Turner testifies that in 1891 Tracy told him that he had sold the lots, and that when he, Turner, requested Tracy to turn over the proceeds to him Tracy refused, and said that he had been advised not to turn over another dollar of the estate to Turner until Turner had qualified for the full amount of the estate (R., 166).

The proceeds of this sale Tracy invested in other notes, secured on Maryland Avenue property, as we think the record shows, and afterwards, in May, 1892, wrote to Turner of the $2,600 he had in his hands invested in good notes.

It was on this fund that Thomas Turner made the order in favor of Erle, and it was to this fund that the correspondence with Erle related.

The letters in the record from Erle to Tracy and from Tracy to Erle, and the receipts for money, show on their face that they relate exclusively to the money derived from the sale of the Maryland Avenue lots, amounting to $2,600, and all the facts established by the record are consistent with that construction of them, and with no other.

For example, when interrogated in respect of the statements made by him in his letter of July, 1898, in respect of what he and his brothers and sisters had received of the estate, and in respect of the assignment made by his father for

the benefit of his sisters and brother, he says that he does not know or remember what he meant.

In subsequent letter to Tracy of April 4, 1898, Erle says:

> *"A friend of mine told me that as you had paid me more than one-quarter of the balance left in your hands this should clear you, as the balance would go to the other children, so I just made the suggestion"* (R., 219).

This suggestion, made in a previous letter, was that Tracy, in order to protect him, Erle, from the claim of a creditor, should deny that he, Tracy, had any money of Erle's in his possession.

These considerations and the facts upon which they are based, in the light of the authorities we have cited, show conclusively that Erle Turner was guilty of laches and acquiescence and is not entitled to relief in a court of equity.

In the case of *Hammond vs. Hopkins, supra*, which in many respects is similar to this case, the court said (p. 230):

> "No rule of law is better settled than that a court of equity will not aid a party whose application is destitute of conscience, good faith, and reasonable diligence, but will discourage stale demands, for the peace of society, by refusing to interfere where there have been gross laches in prosecuting rights, or where long acquiescence in the assertion of adverse rights has occurred. The rule is peculiarly applicable where the difficulty of doing entire justice arises through the death of the principal participants in the transactions complained of, or of the witness or witnesses, or by reason of the original transactions having become so obscured by time as to render the ascertainment of the exact facts impossible. Each case must necessarily be governed by its own circumstances, since, though the lapse of a few years may be sufficient to defeat the action in one case, a longer period may be held requisite in another, dependent upon the situation of the parties, the extent of their knowledge or means of information, great changes in values, the want of probable grounds for the imputation of in-

tentional fraud, the destruction of specific testimony, the absence of any reasonable impediment or hindrance to the assertion of the alleged rights, and the like."

IV.

The complainant Wilmer Turner is not entitled to recover of the appellees any part or proportion of the property transferred by Tracy to Thomas Turner, in November, 1888, because of her acquiescence and laches.

In respect of the acquiescence and laches of Wilmer Turner we refer to our first brief, pp. 55, 56, and 59. We applied to her no stigmatizing epithet and made no charge of criminal conduct, as charged in appellee's brief, page 63.

It is nevertheless true that the averments in paragraph 19 of the bill, to which we have already referred, were inconsistent with the facts which the record shows were well known to Wilmer and her brother Erle, and the only explanation or excuse made in the appellees' brief for these incorrect averments is the suggestion that they may be considered immaterial and irrelevant to the main allegations.

It is to be borne in mind that whatever facts Wilmer may have been ignorant of, she did know from both her father and mother, in 1893 or in 1895, that S. H. Turner's estate had been left to her and to her sister and brothers.

While it is true that the neglect, delay, and laches of Wilmer in ascertaining and enforcing her rights did not date from so early a date and did not continue so long as the neglect, delay, and laches of Erle, it is certainly true that the consequences of her inaction and acquiescence were equally injurious and disastrous to the defendants in this, that the death of Tracy has deprived his estate of his testimony of his

explanation of the unusual circumstances in which this suit had its origin.

It is obvious from the record, and conspicuously plain, that, in view of the fact that the case of complainants is mainly dependent on parol evidence, the loss of the testimony of Tracy himself by his death is an irreparable injury.

In *Sebring vs. Sebring* (43 N. J., Eq., 59) it was held that when a complainant has suffered his suit to lie without prosecution for six years, and it appears that the case is one which must be proved and resisted mainly by oral evidence, his bill should be dismissed simply on the ground that he has by his laches rendered it difficult, if not impossible, for the court to ascertain what the truth is.

In *Cranmer vs. McSwords* (24 W. Va., 594, 601) the court, in explaining this rule, said:

> "When the lapse of time has been less than twenty years, the decided cases show that the most important considerations in support of this defense (laches) are: *first, the death of the parties to the original transactions involved* or the intervention of the rights of third persons; second, the loss of evidence where the transactions are complicated so as to render it difficult, if not impossible, to do justice; and third, the character of the evidence by which it is sought to establish the demand—for instance, if the important facts are to be proved by parol testimony depending on the mere recollection of instances. * * * Where these elements exist, or some of them, courts have denied relief after a lapse of much less than twenty years."
>
> See also *Godden vs. Kimmell*, 99 U. S., 201, 210, and cases cited in our first brief, pp. 56, 57.

In *Le Gendre vs. Byrnes* (44 N. J. Eq., 372) the court held that where delay deprives the court of the power of ascertaining with reasonable certainty what the truth is respecting the matter on which the complainant rests his right to

a decree, or that he has by his delay placed himself in a position where he has gained an unfair advantage over his adversary, his bill will be dismissed.

V.

The liability of Tracy's estate for the item of $1,800 which appears in the receipt given by Thomas Turner.

It is undeniable that this sum was never paid over to Thomas Turner, and that according to Tracy's statement it was increased and became $2,600, which Tracy held and had not fully accounted for at the time of his death. He had paid Erle $1,350 and sent to him a deed for one-half of all his (Tracy's) right and interest in certain other property in square 649, in this city, for which Mr. Edmonston was one of the trustees (R., 207).

In a proper proceeding the complainants, excluding Erle, would, we admit, be entitled to recover three-fourths of this sum of $1,800, with interest or profits. Erle Turner would be entitled to recover nothing, as he has already received in money much more than his proportion.

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